ADR for Legal Professionals

Second Edition

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Preface

The second edition of *ADR for Legal Professionals* is intended to guide students in law-related programs as they prepare for the practice of law or to become alternative dispute resolution practitioners. With a practical focus, featuring examples, practice tips, and discussion questions, the text enables students to apply their dispute resolution knowledge and skills at each stage of a dispute in order to successfully represent their clients. While this book evolved from our own ADR course for paralegals, and meets the Law Society of Ontario's standards, the skills it emphasizes are valuable to other areas of legal practice.

New to this edition, a recurring case scenario is provided to show an ongoing example of the different opportunities to resolve a conflict. In addition, detailed role plays in negotiation, mediation, and arbitration use scenarios that are focused on typical legal issues such as landlord and tenant, personal injury, contractor and owner, neighbours, and employment disputes. Students participating in the roleplays are provided with step-by-step processes including advocacy worksheets for client preparation and draft settlement agreements.

Alternative dispute resolution (ADR) processes are increasingly important in the practice of law. Chapter 1 sets ADR in context by discussing the history of ADR, access to justice, and ethical and professional requirements of legal representatives when representing clients in ADR processes. Chapter 2 introduces theoretical definitions of conflict and examines the different styles of resolving conflict. Chapter 3 shows how to analyze conflict situations using various theoretical approaches, and Chapter 4 explores the skills that are needed to resolve conflict.

The three main dispute resolution processes—negotiation, mediation, and arbitration—are covered in detail in the next six chapters. Chapters 5 and 6 discuss negotiation and how to prepare to negotiate, Chapters 7 and 8 focus on mediation and mediation advocacy, and Chapters 9 and 10 examine the arbitration process and how to properly prepare for an arbitration.

Chapter 11 explores the factors to consider in selecting the right ADR process for clients and discusses the impact of gender, culture, and ethics in ADR situations. Chapter 12 introduces students to selected topics in ADR, specifically Indigenous dispute resolution, administrative tribunals, online dispute resolution, and training opportunities for ADR practitioners.

We hope this text will be the first step in teaching students how to resolve conflict outside of the traditional litigation process so that they can successfully apply ADR in their profession. As ADR increases in importance and becomes more widespread in the legal environment, we hope this book will inspire more legal professionals to use ADR skills and improve their clients' access to justice.

The Importance of ADR for Legal Representatives

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Learning Outcomes

After reading this chapter, you will be able to:

- Understand the historical tendencies and systemic challenges to alternative dispute resolution (ADR).
- Recognize the changing nature of settlement within the litigation process.
- Consider how access to justice and paralegals are linked.
- Assess the importance of ADR within the context of the legal representative and client.
- Understand the function and principles of the Law Society of Ontario and how they impact the regulation of legal representatives.
- Assess the regulatory framework as it relates to paralegals and ADR.
- Define the purpose of the code of conduct established by the Law Society of Ontario for its licensees and the ethical responsibilities it imposes on them.
- Fulfill a paralegal's duties as set out in the *Paralegal Rules of Conduct* and its specific sections that engage ADR duties and responsibilities.
- Comprehend the paralegal's duty to advise clients about dispute resolution options, including negotiation, mediation, and arbitration, as alternatives to litigation.
- Apply the concepts from this chapter to a recurring conflict case scenario.

Introduction

There is little question that over the last 30 years, there has been a widening gap between the delivery of legal services and the citizens who rely on them. The traditional users of legal services have required strong advocates, lawyers who fight for their clients in an adversarial system that pits one party against another in a courtroom before a judge. Regrettably, the traditional legal resolution system no longer reflects the needs and interests of ordinary folks. Throughout this chapter, we will explore the impact of these changes on society and the complex correlation between the growing need for alternative methods to resolve these disputes and the increasing use of the legal representatives who offer them.

As court costs rise and the courtroom backlog causes longer delays, the adjudicative system heads further and further out of reach for the average person. The result is a noticeable trend toward the use of alternative methods to resolve disputes—**alternative dispute resolution, or ADR**. Increasing delays, excessive and unknown costs, and the unpredictable nature of outcomes in court have forced the average person to seek alternatives to traditional adjudication. The legal industry has responded by requiring more alternatives as part of the litigation process. In fact, the regulating body for paralegals and lawyers, the **Law Society of Ontario (LSO)**, under its codes of conduct such as the ***Paralegal Rules of Conduct*** and the ***Rules of Professional Conduct***, requires these legal representatives to inform clients of ADR options for every dispute.[1] Similarly, choosing the right legal representative in a dispute may depend on factors such as affordability and accessibility for many people faced with the rising costs of adjudication and high lawyer fees.

This book will help legal representatives and supporting roles in the legal industry—including lawyers, paralegals, law clerks, legal assistants, etc.—to not only focus on understanding ADR in conflict but also outline how to apply these skills at each stage of a dispute in order to successfully represent clients in dispute resolution settings.

alternative dispute resolution (ADR) the use of methods such as negotiation, mediation, and arbitration as alternatives to litigation to resolve disputes

Law Society of Ontario (LSO) the regulatory agency for paralegals in Ontario

Rules of Professional Conduct* and *Paralegal Rules of Conduct codes of conduct set out by the LSO that lawyers and paralegals are required to adhere to or risk losing their licence to practise law

The History of ADR in Law

The Traditional Practice of Law

A brief look at our legal system will quickly show how adjudication has dominated conflict resolution and the legal community. Training for legal representatives has focused primarily on legal theory and trial advocacy. This of course is peculiar since only a fraction of disputes end up in court. In fact, statistics in some jurisdictions show that 98.2 percent of all adjudicated disputes are resolved outside the courtroom and involve some manner of negotiated settlement.[2] "And yet, the reality of the legal practice is that we spend most of our lives as lawyers negotiating with others."[3]

1 Law Society of Ontario, *Paralegal Rules of Conduct* (1 October 2014; amendments current to 24 February 2022), online: <https://lso.ca/about-lso/legislation-rules/paralegal-rules-of-conduct>. For the most up-to-date material, please visit the website referenced in this footnote.

2 M Galanter, "The Vanishing Trial: An Examination of Trial and Related Matters in Federal and State [illegible] Empirical Legal Stud 459.

Notwithstanding that statistic, the training and education of legal professionals focus little on conflict resolution as an important skill to develop, nurture, and teach.

It is only in recent years that negotiation has been acknowledged as an important skill to the legal profession and a positive alternative to adjudication. Law schools now offer courses in alternative dispute resolution and negotiation. Change is slow, and most Canadian law schools continue to focus their legal education on an adjudicative, individual rights–based model of justice.[4] A **rights-based model** of justice emphasizes an individualistic approach wherein the rights of the individual are protected against the oppressive assertion of another's rights. It is this model that fits the stereotype of the adversarial lawyer and accentuates characteristics of aggression, "winning," tenacity, and avoidance of cooperation in order to push clients' rights ahead of all others. It will take much change within the legal profession before any attitudinal shift from the adversarial practitioner trickles down to the education of legal students.

rights-based model a model of justice in which the rights of the individual are protected against the oppressive assertion of another's rights

Economic and Social Changes in the Legal Profession

A study of the legal profession has shown that historically it has responded to current events and changes in its environment, albeit slowly. The more recent impact of the pandemic necessitated more immediate, drastic, and much needed changes to a very reluctant system. The nature of the legal profession requires the role of legal representatives to be concerned with following changes to a client's environment and less with initiating change or with innovation within the legal system itself.[5] Unfortunately, that change is not always in the best interests of all clients that require legal professional services.

One of the most significant and noticeable changes has occurred with the kind of clients being served by the profession. Increasingly competitive economic markets in Western countries have produced large corporations and a demand for corporate and commercial law services and practitioners. Consequently, the legal industry has responded with the establishment of new and highly specialized legal services such as intellectual property law and securities law, among many others. Large legal firms have begun to emerge in response to increasing demands from corporate clients.[6] The result of this trend toward large firms has been the absorption of sole practitioners.

The resulting impact of these changes to the organizational and economic structure of law firms is significant. While the number of corporate files increases in line with the emergence of and demand for corporate law, the number of personal client work decreases, much to the dissatisfaction of those clients. Personal clients can no longer afford the rising per-hour legal fees of the mega-firm lawyers, and they have a smaller number of sole practitioners to choose from.

The problem of access to affordable legal fees is exacerbated by the cost of the traditional method of resolving conflicts by lawyers: going to trial. The average cost of a five-day trial in Canada is 2021 was $75,000–95,0000,[7] more than the annual

4 J Nonn

after-tax income of many Canadian families in recent years.[8] Fees have shown a continued rising trend year over year. It is difficult to tell how the impact of the global pandemic and slowdown of the economy will shift legal spending.[9] Despite the fact that the number of matters that settle before trial is so high, there continue to be long waits for trials across Canada's legal system. An issue that was attempted to be addressed by criminal courts when strict timelines of 18 months were imposed on criminal trials following the *R v Jordan*[10] decision. Unfortunately, the COVID-19 pandemic only exacerbated the delays causing a tremendous backlog of cases. In-person court proceedings were suspended during lockdowns and only urgent matters were attended to remotely. Of course, the pandemic has also helped jurisdictions to adapt and press for changes such as running hearings electronically in order to address the backlog. Going to trial is simply unattainable for many.

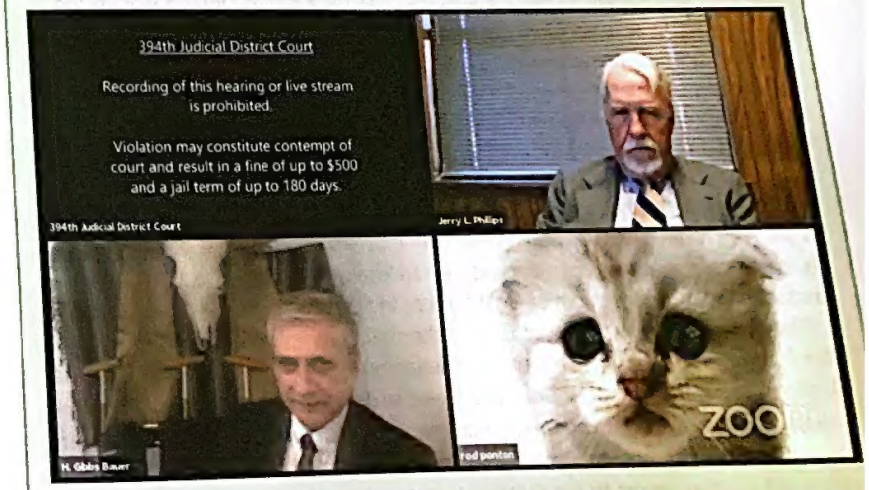
It is clear that for those unable to access a lawyer in private practice through the traditional methods, the delivery of legal services will have to evolve to meet their demands. Many organizations have reacted to what the market is now demanding, and progressive employers such as the LCBO, the Canada Post Corporation, the National Capital Commission, our national banks, and even sports organizations such as the Ontario Hockey League are all employing conflict resolution methods to resolve disputes outside the legal system. Adjudicative justice may no longer appear to be the preferred method to resolve disputes where obtaining closure and preserving long-term relationships may be more important.

LEGAL SERVICES IN A POST-PANDEMIC ERA

The COVID-19 pandemic has had a significant impact on the delivery of legal services. The pandemic brought closures to hearings, courtrooms, administrative offices, and many physical spaces for dispute resolution. Legal professionals continued to serve their clients in an online environment by adapting their business practices and scope of practice. They often struggled to assist their clients to access justice despite the lengthening delays. With the closure of courts and limits to in-person appearances, all in-court proceedings became virtual using remote teleconferencing or videoconferencing such as Zoom. Many court appearances were initially restricted to urgent matters only, causing a significant backlog in cases that may take years to reduce. Parties, witnesses, and legal representatives could attend court appearances from the comfort of their home and did not incur travel costs to the courthouse. Printing and binding documents were no longer required as documents were filed electronically saving significant disbursement costs. Legal representatives now worked from home offices.

It is not known what long-term impact the pandemic will have on legal fees and areas of practice. While legal service rates have increased marginally since the pandemic, the total bills have often lowered due to pandemic related efficiencies. While *The Canada Lawyer's* 2021 Legal Fees Survey have noted a continued rising trend of slight fee increases by legal representatives, there has also been an increasing percentage of legal service providers that have lowered their fees as a result of these savings.[11] Many legal representatives may choose not to return to the office and continue to work from home thus reducing general overhead business costs such as disbursements and court appearances. Even costs of renting a room for an arbitration or mediation no longer applies. The demand for particular areas of practice was also affected by the pandemic. Personal injury law has become increasingly competitive as a result of fewer matters. Pandemic related lockdowns and travel restrictions reduced the number of car accidents and personal injury claims. Conversely, other pandemic related closures, layoffs, lockdowns, school and business closures, and vaccination requirements have increased the level of crisis and conflict within many personal and business relationships leading to an increase in legal actions and claims.

The delivery of legal services has also been affected by the pandemic. As the courts have adjusted to remote and electronic processes, it has become increasingly difficult for the unrepresented person to navigate the legal system, necessitating a legal representative. Even legal representatives have had to adapt to constantly changing methods of the delivery of legal services. One particular legal "blooper" went viral as a lawyer in Texas was unable to remove a filter during a virtual legal proceeding over Zoom that turned his face into a cat. "I'm here live. I'm not a cat,"[12] the lawyer Rod Ponton stated while the judge attempted to guide him through removing the filter on Zoom. Courts and tribunals were regularly updating and changing legal procedures in response to COVID-19 as staff and adjudicators continued to work remotely, and all in-person service counters were closed.



8 Statistics Canada, *Canadian Income Survey*, 202

A BRIEF HISTORY OF PARALEGALS IN ONTARIO

Alternative justice comes in many forms. Much like the existence of the need for alternative *methods* to the adversarial system for resolving disputes, there is equally a need for alternative *service providers*. For many people, when lawyers are inaccessible and unaffordable, the options are limited.

The road to the regulation of the paralegal has been a long and complex one. The paralegal industry began without much in the way of a consistent definition of what exactly a paralegal is. Adding to the confusion, the parameters of practice provided by paralegals differed significantly from one region to another across North America. Ontario legislation often referred to non-lawyers who represent clients before courts and tribunals as "agents."

During those early decades, the traditional practice and regulation of lawyers in Ontario was conducted by the self-governing LSO. Any unauthorized practices of law, including those practices of the paralegal, would be prosecuted by the LSO. As there was no specific definition of the "practice of law," it was unclear what fell under those specific parameters and how it affected the services of paralegals. While some statutes specified the representation by "solicitors" in certain proceedings, others allowed for representation by "agents," such as the *Statutory Powers Procedure Act*.[13] Representation by "agents" in these tribunals, however, seemed to be in direct contravention of the *Law Society Act*.[14]

Despite strong public support for the use of paralegals, there was much concern about the accountability and regulation of paralegal activities. These concerns continued and came to a head following the 1987 Ontario *Pointts* decision wherein the right of an agent to provide legal services for a fee in Ontario was tested.[15] The impact of that decision was enormous, and it was widely—but, by many, erroneously—interpreted as sanctioning a host of agency-related activities for paralegals. Consequently, independent paralegal activity flourished in traditional areas of paralegal services and expanded to other areas of representation such as family law, incorporations, and wills.

There was an immediate response. Independent paralegals were suddenly investigated and charged by the LSO for unauthorized practices that were not approved in the *Pointts* decision. Despite increasing numbers of prosecutions pending across the province, the number of independent paralegals grew markedly, along with the provision of a wider spectrum of legal services to the public.

The pressure was evident, but despite the conclusion of the report by the Ianni Task Force on Paralegals in 1990 that paralegals provide an important service to the public for many reasons and should be allowed to deliver a limited range of legal services within a regulated environment, no forward movement was made. Almost ten years after the Ianni report, in May 2000, the Honourable Peter Cory was tasked to deliver yet another report to the Ontario Ministry of the Attorney General outlining recommendations to regulate the paralegal practice in Ontario. His framework was based on the same two themes as the Ianni report: "to extend access to justice and to ensure the protection of the public."[16] More submissions followed, from both the LSO and paralegal organizations, that supported some kind of regulation of paralegals, but the organizations disagreed as to which body would control that regulation and oversee the paralegal profession.

Finally, amid growing pressure, the Ontario government decided that the LSO would be the most experienced and affordable option—and least burdensome on the public purse—for regulation. On October 19, 2006, Bill 14 was enacted by the Ontario legislature, expanding the mandate of the LSO to provide for the regulation of paralegals in the public interest.[17] Today, according to the LSO Annual Report 2020, more than 9,607 paralegals are licensed in Ontario, providing consumers with more choice, more protection, and improved access to justice.[18]

Access to Justice

The effectiveness of the legal system cannot be scrutinized without proper consideration of its consumers: the general public. In fact, the importance of accessing justice by the public is an integral part of the democratic process and one of our society's most fundamental values. Arguably, the meaning of section 7 of the Canadian Charter of *Rights and Freedoms*,[19] which guarantees that individuals have a right to "fundamental justice," implies a right to "reasonable access to law in a free and democratic society governed by the rule of law."[20] While all Canadians have the right to know the law and represent themselves before court, they still require much assistance in navigating through legal and judicial processes. Without proper access to legal services, full and meaningful participation in a democratic society is questionable and a potential breach of fundamental rights. As former Chief Justice Beverley McLachlin of the Supreme Court of Canada observed:

> Statistics support the view that accessing the justice system with the help of a legal professional is increasingly unaffordable to most people. Nearly 12 million Canadians will experience at least one legal problem in a given three-year period, yet few will have the resources to solve them. … Among the hardest hit are the middle class—who earn too much to qualify for legal aid, but frequently not enough to retain a legal representative for a matter of any complexity or length. Additionally, members of poor and vulnerable groups are particularly prone to legal problems, and legal problems tend to lead to problems of other types, such as health issues. …
>
> Fulfilling the public's expectations for justice—in a phrase, providing "access to justice"—is vital. It is vital to providing the justice to which every person is entitled.

16 PD Cory, *A Framework for Regulating Paralegal Practice in Ontario: Report* (Toronto: Ministry of the Attorney General, 2000) at 19.

17 Bill 14, *An Act to Promote Access to Justice by Amending or Repealing Various Acts and by Enacting the Legislation Act, 2006*, 2nd Sess, 38th Parl, Ontario, 2006 (first reading 27 October 2005).

18 Law Society of Ontario, "Annual Report 2020" (last visited 17 May 2022), online: Law Society of Ontario <https://lso

Former SCC Chief Justice Beverley McLachlin

Statistics show that people who get legal assistance in dealing with their legal problems are much more likely to achieve better results than those who do not. As servants of justice, legal representatives have a duty to help solve the access to justice crisis that plagues our legal systems. It is vital to the rule of law.[21]

Although there are many definitions of what access to justice means, for the purposes of this book, **access to justice** is defined as the ability to use the legal system to obtain justice. It is important to understand that *access to courts* is not the same as access *to justice*. Access to courts has been defined more simply as the equal right of citizens to participate in all institutions of law as an integral part of a constitutional democracy. However, this does little to address a more comprehensive understanding of how to access our legal system. Access to justice ensures not only greater physical accessibility to the courts and rules; it involves further steps to go beyond the legal system and respond to ways that the legal system impedes or promotes economic or social justice. Instead, the challenge is to focus on the structure of justice and how it can better accommodate the diversity, values, and aspirations of different communities and individuals.

access to justice
the ability to use the legal system to obtain justice

The concern is that unresolved legal problems can often lead to great personal hardship for some individuals. Research conducted by the Ontario Civil Legal Needs Project finds a strong correlation between access to justice issues and broader issues of health, social welfare, and economic well-being.[22] The research confirms that the poorest and most vulnerable Ontarians face the greatest barriers to accessing justice, such as persons with disabilities, people whose first language is neither English nor French, persons with limited literacy, people living in remote communities, older people, and women.[23] Additional obstacles of real and perceived costs of legal services, and the lack of access to legal aid and legal information and resources, only amplify these existing barriers.

Unfortunately, the pool of lawyers who have traditionally responded to the legal needs of these vulnerable Canadians is shrinking. Traditionally, small firms and sole practitioners have been the primary providers of legal services to lower- and middle-class Canadians. In the past, these firms have reported that 77 percent of their clientele are individuals.[24] Regrettably, trends show significant decreases in the number of existing and new lawyers practising in small firms, as sole practitioners, and within legal aid organizations. The impact of this decrease is increasingly felt in more remote geographic areas where families and individuals often lack access to legal representatives. These supply problems leave a vulnerable group of people even more exposed and further threaten their ability to access justice.

For low- and middle-income Canadians, civil legal needs arise frequently in their lives, and these needs touch upon fundamental issues and life circumstances. According to the research cited above, over a three-year period, one in three low- and middle-income Ontarians had non-criminal legal issues, and one in ten had multiple legal issues.[25] The existence of public disputes and the need to resolve these disputes will not simply disappear or resolve on their own. For many, the mere complexity of the legal system has been a significant barrier to access to justice. Members of the public often turn to self-representation as an immediate alternative and survival measure, though in most cases it does not serve their interests well. Studies on the impact of self-representation on case outcomes show that a person's chance of success in a legal action is automatically lowered if they represent themselves—some by as much as 90 percent depending on the type of hearing (see Table 1.1).[26] Despite the poor results, self-represented litigants continue to grow. In fact, in Canada, almost 60 percent of litigants in family law are unrepresented,[27] a shocking statistic that has forced the LSO to consider licencing of additional Family Law Service Providers.

TABLE 1.1 Self Represented Litigants versus Represented Party Outcomes, Ontario Superior Court, January 2012–April 2016

	All hearings	Motions	Trials	Applications
Total Hearings	1192	989	120	72
Win	163	124	30	9
Loss	865	720	94	56
Split	33	26	3	4
No order	93	80	5	2

National Self Represented Litigants Project, "Finally, Canadian Data on Case Outcomes: SRL vs. Represented Parties" (18 April 2016), online: *NSRLP Blog* <https://representingyourselfcanada.com/finally-canadian-data-on-case-outcomes-srl-vs-represented-parties>.

Many litigants try to resolve legal matters by themselves with legal assistance but not necessarily with the assistance of legal representatives. One in three low- and middle-class Ontarians say they prefer to resolve their legal needs by themselves without legal advice.[28] The Ontario Civil Legal Needs Project researched low- and middle-income Ontarians about their preferred way of resolving legal problems. Interestingly, the majority indicated they would prefer to resolve their problems themselves with

21 B McLachlin, "The Legal Profession in the 21st Century," Remarks at the 2015 Canadian Bar Association Plenary, Calgary (14 August 2015), online: Supreme Court of Canada <https://www.scc-csc.ca/judges-juges/spe-dis/bm-2015-08-14-eng.aspx>.

22 Ontario Civil Legal Needs Project, *Listening to Ontarians: Report of the Ontario Civil Legal Needs Project* (Toronto: Ontario Civil Legal Needs Project Steering Committee, 2010) at 44, online: *Canadian Commons*.

23 *Ibid* at 46.

24 *Ibid* at 48.

25 *Ibid* at 3.

26 National Self Represented Litigants Project "Finally, Canadian Data on Case Outcomes: Self Represented Litigants vs. Represented Parties" (18 April 2016), online: *NSRLP Blog* <https://representingyourselfcanada.com/finally-canadian-data-on-case-outcomes-srl-vs-represented-parties>.

27 "Just Facts: Self Represented Litigants in Family Law" (June 2016), online: *Department of Justice* <https://www.justice.gc.ca/eng/rp-pr/fl-lf/divorce/jf-pf/srl-pnr.html>.

28 McMurtry, *supra* note 22 at 4.

legal advice (34 percent), a smaller proportion said they would prefer to resolve their problems through an informal process such as mediation (22 percent), 13 percent said they would prefer to resolve their problems through a formal process such as a court or tribunal, and only 6 percent said they would prefer to resolve their legal problems on their own without any help. See the table below for more details.

TABLE 1.2 Preferred Way of Resolving Legal Problem, June 2009

By self with legal advice	34%	By self with no help	6%
Informal process (mediation)	22%	Other/depends	2%
By self with family/friends	16%	Doing nothing	3%
Formal process (court, tribunal)	13%	Don't know/not applicable	4%

Ontario Civil Legal Needs Project, *Listening to Ontarians: Report of the Ontario Civil Legal Needs Project* (Toronto: Ontario Civil Legal Needs Project Steering Committee, 2010) at 26.

As public pressure for access to justice continues to mount, judicial systems across North America have responded. Civil justice reform has included changes such as case management programs to set timelines, early exchange of documents, and increased encouragement to settle. "Simplified rules" for certain civil litigation matters in Ontario within a monetary range of $35,000 to $200,000 have been legislated as a means of simplifying procedures, eliminating unnecessary and costly steps such as limiting the discovery processes, and requiring mandatory meetings and settlement discussions.[29] The limit for the Ontario Small Claims Court has steadily increased, and is now $35,000, which will allow businesses and individuals to resolve their disputes in a less formal, and affordable way. Some provinces, such as Alberta, have seen small claims court claim limits increase as high as $50,000. Areas of law such as family and criminal law have responded and are steering away from purely adversarial methods. Collaborative family law lawyers and criminal restorative justice measures both seek to reduce judicial time arguing cases and to spend more time negotiating an appropriate outcome that meets the needs of the parties. Other initiatives, such as mandatory mediation, are similarly being used to divert matters away from trial toward settlement discussions. Since 1999, Ontario has imposed mandatory mediation in civil lawsuits within certain jurisdictions. Not all provinces require mandatory mediation prior to trial. Many administrative tribunals offer voluntary or mandatory mediation and arbitration streams as attempts to resolve disputes earlier.

Several other legal organizations already have in place a comprehensive range of programs and services designed to provide legal assistance to low- and middle-income residents. Legal Aid programs can be found in almost every province and territory. The LSO, Legal Aid Ontario, and Pro Bono Law Ontario all share a common goal to improve access to justice for all Ontarians and have implemented corresponding programs. While their services are heavily utilized, there has been little empirical data to determine if the services are meeting the needs of Ontarians effectively, if there are unmet legal needs, and if there are many people who have been unable to access them. Unfortunately, these programs and incentives are limited and are surely only the beginning of a process to address the barriers the public encounters in accessing justice.

The importance of justice for individuals and for Canadians as a whole cannot be understated. While the solution of improving access to justice for all people may be obvious, implementing a solution is not easy. Legal service models should be designed to target and respond appropriately to the specialized needs of those communities. This would require removing economic and geographic barriers to legal services. Specifically, the legal system would need to have multiple, diverse, and integrated access points and service responses. It would include an alternative system of justice that helps people identify and resolve issues outside the traditional system.

As so aptly described by the Supreme Court of Canada in its 2014 decision *Hryniak v Mauldin*:

> Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just.[30]

The Evolution of ADR and Conflict Resolution

According to a symposium organized by the Department of Justice Canada in 2000, "the most significant barriers to access can only be overcome through a reorientation in the way we think about conflicts, rights, adjudication and all-or-nothing judicial remedies."[31] At the symposium, lecturer Jacques Dufresne argued that an alternative process treats access to the legal system as a means of last resort, with self-regulation at the base, preventive law and alternatives in the middle ground, and the court at the apex. Disputes that cannot be settled first by alternative means such as conciliation, mediation, and arbitration should go to trial only as a last resort.

The movement toward mediation and acceptance of other alternatives within the legal community has been a slow one. Mandatory mediation was first brought into the civil justice system in Ontario in 1999. Currently, Ontario and Quebec offer mandatory mediation. Some provinces such as Alberta are reintroducing mandatory mediation pilot programs in civil and family litigation. British Columbia offers it only if one party requests it.[32] Judicial pre-trials were the closest precursor to mediation. The pre-trials were meant to be neutral evaluations whereby a judge would express their non-binding opinion on a case as a means of encouraging early settlement and avoiding a long, expensive trial. When mandatory mediation was finally introduced into the civil justice system, a significant change to the justice system began to take place.

29 Ministry of the Attorney General of Ontario, "Civil Claims: Simplified Procedure" (4 March 2022), online: *Government of Ontario* <https://www.ontario.ca/page/civil-claims-simplified-procedure>.

30 *Hryniak v Mauldin*, 2014 SCC 7 at para 2.

31 Department of Justice Canada, Symposium, *Expanding Horizons: Rethinking Access to Justice in Canada* (31 March 2000) at 4, online (pdf): <http://publications.gc.ca/collections/collection_2010/justice/J4-4-2000-eng.pdf>.

32 B Harrison & G Ivanovic, "When is Mediation Mandatory? A Comparative Analysis of Mandatory Mediation Across Canada" (October 2019), online: *McMillan LLP* <https://mcmillan.ca/insights/publications/when-is-mediation-mandatory-a-comparative-analysis-of-mandatory-mediation-across-canada>.

mediation
a process that occurs before a non-partisan third party who assists the parties in reaching a settlement by facilitating their negotiations with their joint consent

Mediation is a process that occurs before a mediator, someone who is not a judge but instead a non-partisan third party, who assists the parties in reaching a settlement by facilitating their negotiations with their joint consent. Both counsel and their clients are authorized and encouraged to attend. Mediation can be used for a wide range of conflicts, including civil, criminal, commercial, employment, and family matters, as well as in private disputes, administrative tribunals, and many other areas. It is sometimes a mandatory part of the court process or can be sought on a voluntarily basis by parties wanting to resolve their dispute outside litigation.

Unfortunately, mediation is a process that has long been opposed by many lawyers and judges. For some judges, who were familiar with the traditional and formal process of a courtroom, the informal mediation setting was unacceptable. Their preference was for a formal legal proceeding in a courtroom with all parties present, applying the proper rules of courts and rules of evidence, and with representatives acting in accordance with their traditional roles. Informal mediation simply lacked the proper dignity and decorum of the courtroom. Many lawyers expressed the same sentiment, albeit for slightly different reasons. When mediation was first introduced, many lawyers loathed the process and avoided it as much as possible. They saw it simply as an additional cost and administrative step that did not contribute to the action. Lawyers who attended mediation with their clients present and active felt a loss of control over the proceedings. As one lawyer describes:

> The first few mediations, I hadn't had any mediation training. My only training was the general attitude in the profession that this is a lot of horse crap and I had settlements hit me between the eyes and I couldn't believe my clients sold out on me the way they did. I was concerned that I had a serious client-control problem.[33]

THE TOUGH TRANSITION TO MEDIATION

Much of the early antipathy toward mediation was the result of a lack of any foundation from schooling or early mentoring because most lawyers truly did not have any idea how to work within the mediation forum. Solicitor and now mediator Joy Noonan recounts her personal experience:

> I have no doubt that had I been fortunate enough to have received even a small fraction of the ADR training I now have and employ daily—there would have been fewer anxious nights preparing for mediations and clients would have been better served, faster.[34]

Another lawyer put it this way:

> I mean, we're trained as pit bulls, I'm not kidding you, I mean we're trained pit bulls and pit bulls just don't naturally sit down and have a chat with a fellow pit bull, the instinct is to fight and you just get it from the first phone call. I'm bigger and tougher and stronger and better than you are.[35]

33 J Macfarlane, "Culture Change: A Tale of Two Cities and Mandatory Court-Connected Mediation" (2002) 2002:2 J Disp Resol 241 at 301, online: <http://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=1415&context=jdr>.

34 Noonan, *supra* note 4.

35 Macfarlane, *supra* note 5 at 12.

The role of the judge in our justice system is evolving in response to managing conflicts outside of trial. There is an increasing use of what is known as **judicial mediation**, in which a judge acts as a mediator in facilitating settlement between the parties. This is used as an option prior to proceeding to trial. Former Chief Justice of Ontario Warren K. Winkler reflected that judicial mediation will continue to be expanded beyond its present form and will only enhance access to justice.[36] The compelling factor for many of the clients is that the judicial mediation process is free, in contrast to ordinary mediation, which the parties must fund themselves. The process of judicial mediation has been particularly effective and widely used in matters before small claims courts and administrative tribunals.

judicial mediation
a process in which a judge acts a mediator in facilitating settlement between the parties

Judges themselves have also evolved to meet the changing needs of ADR within our justice system. In fact, in many more informal tribunal or small claims court settings where the litigants are often unrepresented and have little of no pre-trial discussions, the judges will refuse to proceed with the trial until the parties have confirmed they have attempted negotiation or mediation. Judges will ask the parties if they have met beforehand to discuss settlement. If the answer is no, the judge might send them out to the hallway of the courtroom to attempt settlement and refuse to begin a trial until the parties have confirmed their attempt.

Similarly, administrative tribunals may use a number of ADR mechanisms to encourage parties to settle disputes before a hearing, such as negotiation, mediation, conciliation, and arbitration. These methods may be mandatory or voluntary, depending on the particular rules of that tribunal. In Ontario, ADR is specifically addressed in the overarching statutory rules governing administrative tribunals. Sections 4.8 and 4.9 of the Ontario *Statutory Powers Procedure Act* allow tribunals to make their own rules respecting the use of alternative dispute resolution mechanisms. Tribunals also employ a similar style of judicial mediation, which allows adjudicative board members and/or tribunal staff to act as mediators or other facilitators in ADR processes. Although mediation may simply lead to more cost and delay before the inevitable hearing, an effective tribunal will not usually impose mediation in all cases. This will largely depend on the particular tribunal. Administrative tribunals account for a significant number of legal actions across Canada. Subsequent chapters in this book will consider the dispute resolution methods within administrative tribunals.

Alternative forms of justice such as mediation are now considered an essential service that is embedded in our justice system. Many regard mediation as the most significant change to occur to the justice system in the past 50 years. Currently, mediation is a mandatory step in the civil litigation process. The *Rules of Professional Conduct* and the *Paralegal Rules of Conduct* enforced by the LSO require lawyers and paralegals to advise their clients of ADR methods. ADR is often a policy requirement for many corporations in their policy manuals. Business and employment agreements use ADR as a required initial pre-litigation step in their agreements and as a preventive measure to deal with potential conflicts. For many tribunals, such as the Human Rights Tribunal and the Landlord and Tenant Board in Ontario, mediation and arbitration are important and sometimes mandatory parts of the tribunal process.

36 WK Winkler, "Some Reflections on Judicial Mediation: Reality or Fantasy?" (24 March 2010), online: *Court of Appeal for Ontario* <https://www.ontariocourts.ca/coa/about-the-court/archives/reflections_judicial_mediation/#:~:text=Is%20Court%2DBased%20Judicial%20Mediation,is%20distinct%20from%20its%20availability>.

Thus, the issue is not whether ADR is necessary or vital to our system of justice. The issue is how our legal services providers and the legal industry are adapting to meet the demand for these holistic practices. Alternatives such as mediation are here to stay. With the proper ADR training, legal services providers such as lawyers and paralegals will be better prepared and able to best represent their clients' interests.

The Role of Paralegals in ADR

The correlation between alternative methods of resolving disputes and the use of paralegals comes from the very essence of the paralegal practice, by its own definition, and the need for regulation. In order to understand how paralegals and ADR are so closely intertwined, we need to consider how many of the factors noted above have jointly and simultaneously led to the growth of both alternative methods and alternative service providers, such as paralegals.

One need only look at the people who use paralegals and ADR to quickly see the similarities. Affordability is one of the key reasons that people use paralegals and seek alternatives to resolving disputes. Middle-income Canadians are unable to access legal aid as a means of using the court system. Yet, Chief Justice McLachlin expressed that Canadians of average means may have to consider remortgaging their homes, gambling their retirement savings, or forsaking their children's post-secondary education funds to pursue justice.[37] The hourly rate of a paralegal is significantly more affordable than that of a lawyer. The cost of legal services does limit access to justice for many Canadians. Thus it is those same people who will seek alternative methods such as ADR to avoid going to trial and use alternative service providers such as paralegals to represent them. As former Chief Justice McLachlin says:

> In the age of the Internet, people are questioning why they, the consumers of legal product, should be forced to go to expensive lawyers working in expensive office buildings located in expensive urban centres. Why, they ask, should a client retain lawyers, when integrated professional firms can deliver accounting, financial and legal advice? Why are simple disputes not resolved in simple, cost-effective mediation rather than by elaborate and expensive court proceedings? Public attitudes and demands are changing.[38]

Since one of the primary goals of ADR is to improve access to justice, the ADR process has relied—and continues to rely—heavily on the services of paralegals. Paralegals can participate in the ADR process in several ways. First, paralegals can act in support of a lawyer as they do in other litigation matters. This means that through the entire ADR process, paralegals are often directly involved in gathering and preparing materials that will be presented to the arbitrator or mediator. They assist with administrative arrangements of the ADR proceedings, including preparing clients and other witnesses for what to expect from the ADR proceedings. Finally, they often prepare the documents required once a decision has been made or a settlement has been reached.

37 Canwest News Service, "Access to Justice Is Critical for Canadians" (9 March 2007).

38 *Supra* note 21.

The involvement of paralegals assisting lawyers in ADR proceedings closely parallels their functions in assisting lawyers in traditional litigation.

Second, in addition to assisting the representation of clients in ADR proceedings, paralegals can also act as third-party facilitators, arbitrators, or mediators. Because arbitrators and mediators do not have to be lawyers, with the proper training and experience, paralegals may be able to qualify for such positions. Since mediators are not regulated, there are no standards that currently exist regarding the certification of mediators. However, paralegals have a tremendous opportunity to fill the void for mediators, as their analytical abilities, legal training, and education in mediation will make them desirable candidates.

Finally, paralegals can represent their own clients in many ADR proceedings. As referenced above, ADR proceedings are conducted privately, within judicial processes, such as our court systems, and in administrative tribunals. As licensed representatives, paralegals can fully and effectively act for their clients in these ADR proceedings. No matter where the paralegal turns, most of their practice as a representative, will involve some form of ADR (e.g., small claim courts; provincial offences court, summary conviction offence matters, or administrative tribunals).

ADR Standards of Practice and Ethics

Legal representatives entering the profession must ask themselves how they can represent their clients effectively without ending up in court. There are many alternatives to going to court that representatives can use to resolve their client's disputes, such as negotiation, mediation, and arbitration. Strong negotiation and mediation skills are key to a representative's success. Legal representatives must clearly understand both their ethical and professional obligations to the profession and their clients, related to the use of ADR options. Codes of conduct within the legal profession ensure that legal representatives inform and encourage their clients to use these alternatives and, if so instructed by the client, take steps to pursue those options.

Governance of Legal Representatives

A centrepiece of Canada's legal system is to ensure that the public have the right to fundamental justice by obtaining legal advice and legal representation. In 1797, Canada's oldest law society, the LSO (formerly called the Law Society of Upper Canada) was founded as a way to regulate the legal profession. Over the next 200 years, Canada's law society leaders from around the country established the Federation of Law Societies of Canada as a vehicle to share ideas and common experiences. This non-profit agency is now the national coordinating body. Every legal representative in Canada, including lawyers, paralegals in Ontario, and Quebec's notaries are required by law to be a member of a law society and governed by its rules. The function of these law societies is to regulate the legal professional in the public interest. Canadians expect to be served by legal professionals with honesty and integrity in the provision of their services. Canada's law societies have an important role in hearing and investigating public complaints, and where necessary, impose discipline on legal representatives. The Federation works with law societies to develop high national standards of

regulation "to ensure that all Canadians are served by a competent, honourable and independent legal profession."[39]

Self-Regulation

self-regulated body an organization that has the power to create and enforce industry standards and regulations with its members

The LSO is considered a **self-regulated body**, which requires that lawyers and paralegals be licensed in order to provide legal services. As a self-regulating body, lawyers and paralegals oversee their own regulation through the LSO in accordance with the *Law Society Act*. The LSO is funded through lawyer and paralegal licensing fees. Members of the LSO elect their own members to become *benchers*, who make up a small executive group to regulate and supervise the legal profession in Ontario. These benchers form a variety of committees, such as the discipline committee, and may also serve as adjudicators at discipline hearings.

professional conduct the accepted conduct or actions of professionals during the course of activities in their profession

The licensing process is an important one as it ensures that its members have a certain level of training and education, experience, competence, and **professional conduct**. Based on the authority prescribed by the *Law Society Act*, the *Paralegal Rules of Conduct*, the *Rules of Professional Conduct* for lawyers, the LSO's By-Laws, and the *Paralegal Professional Conduct Guidelines* set out further professional and ethical obligations of lawyers and paralegals. Thus, legal representatives must carefully consider their codes of conduct and by-laws within their profession in the provision of legal services to the public. In view of the principles of the LSO noted above, it is therefore critical for the LSO and its regulated members to consider all methods of conflict resolution, including ADR methods, in the course of their legal practice.

Codes of Conduct

Codes of conduct were introduced to the legal profession in the late 1800s for many lawyers in common law jurisdictions to guide their members. The purpose of a code of conduct is to set out, usually in written form, rules that outline specific professional norms, practices, and responsibilities of an individual or organization. Its purpose is to protect the public and to hold, in this case, legal professionals, to a high ethical standard. By nature of their profession and in acting as an "agent" for parties, lawyers and paralegals exercise considerable power. Not only are they privy to sensitive personal and financial information, but they also often deal with clients who may be vulnerable or unsophisticated.[40] The public therefore requires a way to ensure proper accountability and protection of legal professionals. Prior to the 19th century, there was a common assumption that honour and integrity governed the legal practice and its practitioners. Inappropriate conduct was defined and disciplined through statute law and case law. Today, codes of conducts are used to guide many legal professionals, including lawyers, paralegals, mediators, and notaries. While each law society has its own specific rules of conduct that apply to particular members, all members of the legal profession are required to conduct themselves in accordance with the Federation's basic principles as follows:

- Act honourably and with integrity;
- Provide competent legal services;
- Serve clients in a courteous and prompt manner;
- Respect client confidences;
- Maintain loyalty to clients and avoid conflicts of interest;
- Ensure that fees for services are fair and reasonable;
- Safeguard and preserve funds and property entrusted to them by their clients;
- When acting as advocate, treat Courts with civility and respect, and
- Encourage public respect for the administration of justice.[41]

The Federation created a Model Code of Professional Conduct[42] as a national code for Canadian lawyers. Its rules are designed to establish an ethical standard for the practice of law in Canada while recognizing that regional differences may exist in the application of some ethical standards.

The Function and Principles of the Law Society of Ontario

Paralegals and lawyers in Ontario must look to the LSO for guidance as to the provision of legal services, including any form of ADR. As part of its regulatory function, the LSO is responsible for ensuring that lawyers and paralegals meet its high standards of learning, competence, and professional conduct. In Ontario, it is through the Law *Society Act* that the LSO is empowered to regulate, license, and discipline its members. According to the *Law Society Act*, the function of the LSO is as follows:

> 4.1 It is a function of the Society to ensure that,
> (a) all persons who practise law in Ontario or provide legal services in Ontario meet standards of learning, professional competence and professional conduct that are appropriate for the legal services they provide; and
> (b) the standards of learning, professional competence and professional conduct for the provision of a particular legal service in a particular area of law apply equally to persons who practise law in Ontario and persons who provide legal services in Ontario.

While the function of the LSO is clearly focused on paralegals and lawyers, the LSO must always keep the public interest of paramount concern. This is echoed quite clearly in the principles to be applied by the LSO and set out in the Law Society Act:

> 4.2 In carrying out its functions, duties and powers under this Act, the Society shall have regard to the following principles:
> 1. The Society has a duty to maintain and advance the cause of justice and the rule of law.
> 2. The Society has a duty to act so as to facilitate access to justice for the people of Ontario.
> 3. The Society has a duty to protect the public interest.

39 "What is the Federation of Law Societies of Canada?" (2022), online: *Federation of Law Societies of Canada* <https://flsc.ca/about-us/what-is-the-federation-of-law-societies-of-canada>.

40 J Fairlie & P Sworden, *Introduction to Law in Canada* (Toronto: Emond Montgomery, 2014) at 414.

41 "Law Society Codes of Conduct" (last visited 27 July 2022), online: Federation of Law Societies of Canada <https://flsc.ca/national-initi...

4. The Society has a duty to act in a timely, open and efficient manner.
5. Standards of learning, professional competence and professional conduct for licensees and restrictions on who may provide particular legal services should be proportionate to the significance of the regulatory objectives sought to be realized.

code of ethical conduct set of written rules that regulate the ethical conduct of an individual, party, or organization such as a professional body

When paralegals were first regulated and licensed in 2007, the *Paralegal Rules of Conduct* (Rules) were also created by the LSO to set out the high ethical standards of Ontario's paralegals. This **code of ethical conduct** places an emphasis on the relationship between paralegals and those with whom paralegals deal in their practice and employment. While there is a separate code for lawyers, entitled the *Rules of Professional Conduct*, both lawyers and paralegals share many of the same standards imposed by the same regulatory body. The LSO is thus responsible for handling any complaints against lawyers and paralegals and breaches of their respective codes of conduct.[43]

The Rules aim to ensure that legal representatives observe professional conduct that includes ADR methods. These requirements are woven throughout the Rules to promote and educate the public about ADR as an important and viable option for resolving conflicts and disputes.

The Paralegal Rules of Conduct and ADR

The *Paralegal Rules of Conduct* set out the professional and moral standards that paralegals are required to follow in order to maintain their licence with the LSO. There are nine rules of conduct, which are set out in the box, the *Paralegal Rules of Conduct*. The following discussion in this chapter will focus on specific aspects of the *Paralegal Rules of Conduct* as they relate to a paralegal's responsibilities and connection with ADR. The full *Paralegal Rules of Conduct* are available on the LSO website.[44]

THE PARALEGAL RULES OF CONDUCT

- Rule 1: Citation and Interpretation—Definitions for key terms used throughout the Rules
- Rule 2: Professionalism—Issues related to professionalism, such as integrity and civility, undertakings, harassment, and discrimination
- Rule 3: Duty to Clients—Client-related issues such as competence, confidentiality, conflict of interest, client property and withdrawal from representation
- Rule 4: Advocacy—Duty to clients, tribunals and others, disclosure of documents, interviewing witnesses, communication with witnesses giving testimony, the paralegal as witness and dealing with unrepresented persons
- Rule 5: Fees and Retainers—Issues including contingency fees, joint retainers, fee splitting and referral fees
- Rule 6: Duty to the Administration of Justice—General duty, security of court facilities, public appearances and statements, and unauthorized practice
- Rule 7: Duty to Licensees and Others—Duty to act with courtesy and good faith
- Rule 8: Practice Management—General obligations, marketing, advertising and insurance
- Rule 9: Responsibilities to the Law Society—Communications from the Law Society, duties to report, professional misconduct and conduct unbecoming a paralegal

Competence

Rule 3 of the *Paralegal Rules of Conduct* recognizes the duties that paralegals owe to clients. This duty to the client is paramount and is one of the most important duties of the paralegal. As described by Guideline 5 of the *Paralegal Professional Conduct Guidelines*:

> This duty includes obligations to be competent, maintain confidentiality, avoid conflicts of interest and continue to represent the client unless the paralegal has good reason for withdrawing. As a result, it is important for the paralegal to know exactly who is a client because it is to the client that most of the duties outlined in the *Rules* are owed.

According to Rule 1.02:

> "client" means a person who:
>
> (a) consults a paralegal and on whose behalf the paralegal provides or agrees to provide legal services; or
>
> (b) having consulted the paralegal, reasonably concludes that the paralegal has agreed to provide legal services on his or her behalf
>
> and includes a client of the firm of which the paralegal is a partner or associate, whether or not the paralegal handles the client's work;[45]

An essential part of the duty to the client requires that a paralegal be competent. Thus Rule 3.01(1) requires that "[a] paralegal shall perform any services undertaken on a client's behalf to the standard of a competent paralegal." Clients who hire a paralegal do so because they do not have the knowledge or expertise in the legal industry to represent themselves. As a result, they expect the paralegal to have a certain level of competency and skill to deal with their case. A level of competence is important on the basis of both ethical and legal principles. Legal principles suggest that paralegals must adhere to a certain standard of care to avoid any negligence. Paralegals must also consider their ethical responsibilities and use self-assessment to determine if they feel competent to handle the legal matter without undue delay, risk, or expense to the client (Rule 3.01(2)). A lack of competence not only has an impact on the client, to whom there is a disservice, but also brings discredit to the entire legal profession.

According to Rule 3.01(4)(c), a **competent paralegal** is someone who has and applies the relevant knowledge, skills, and attributes appropriate to each matter undertaken on behalf of a client. This includes "implementing, as each matter requires, the chosen course of action through the application of appropriate skills, including ... (v) negotiation [and] (vi) alternative dispute resolution."

43 Fairlie & Sworden, *supra* note 40 at 414.

44 *Supra* note 1.

45 Paralegal Professional Conduct Guidelines, [...] (current to 24 February 2022), online: Law

Being a competent paralegal requires knowledge of general legal principles and procedures, as well as the substantive law and procedures for the legal services provided. **Substantive law** comprises the statutory law and jurisprudence that creates, defines, and interprets the rights and obligations of those who are subject to it. **Procedural law** comprises the methods and procedures for enforcement of the rights and obligations set out in substantive law.

substantive law
the statutory law and jurisprudence that creates, defines, and interprets the rights and obligations of those who are subject to it

procedural law
the practice and procedural rules that a court or tribunal uses to prescribe the steps to enforce legal rights

It is here that the responsibilities to ADR are clearly set out. A competent paralegal will ensure that, once the necessary information has been gathered and investigated, and the correct procedural and substantive law considered, they will properly contemplate the chosen course of action to recommend to the client. Like advocacy (Rule 3.01(4)(c)(vi)), alternative dispute resolution is a chosen course of action that must be considered by the competent paralegal (Rule 3.01(4)(c)(vi)).

At any stage of the retainer, paralegals would also need to communicate the procedural laws, such as statutes and rules of procedure, that impose certain conflict resolution methods on any given legal action. At the outset of any potential legal action, the paralegal must review the procedural act or rules applicable to that particular court or tribunal to determine all the steps of the litigation process, including ADR methods. Each tribunal, court, and jurisdiction has different rules with respect to the use of ADR. Some require that mediation is mandatory, while in others it is voluntary participation by the parties. Each one may have a different procedure that is required during the course of the action and may include or exclude specific ADR methods.

Moreover, it is the paralegal's duty to ensure that the client is aware of all foreseeable risks, costs, and consequences associated with each course of action. The benefits of ADR will vary at different stages of the litigation process. For example, mediation should be conducted early enough in the litigation process to be cost effective to the parties settling and avoid the excessive costs of litigating the matter in court. Arbitration is advantageous to parties that seek a private adjudicator with a particular specialization, to conduct a hearing that can be tailored to the time and needs of the parties involved. Once all options are explored, the legal representative should not only clearly express a **legal opinion** about the substantive legal implications of the client's case, but also provide a clear assessment of the pros and cons, including costs, associated with the different courses of action. It is through such a legal opinion that the legal representative can provide **professional judgment** to the client. Professional judgment is the paralegal's capacity to assess situations or circumstances carefully and to make sensible decisions about client matters and conduct.[46]

legal opinion
a written or oral opinion given by a licensed paralegal or lawyer to the client that expresses their judgment or advice based on the law that applies to a particular case

professional judgment
the capacity to assess situations or circumstances carefully and to make sensible decisions about matters and conduct

The competent paralegal must also apply effective communication skills. It is no surprise that one of the leading sources of misconduct and client complaints relates to poor communication with the client. This impacts all stages of the litigation process. Guideline 6 notes the following:

> 10. Rule 3 01(4) contains important requirements for paralegal–client communication and service. In addition to those requirements, a paralegal can provide more effective client service by
>
> 10.1 keeping the client informed regarding his or her matter, through all relevant stages of the matter and concerning all aspects of the matter,
>
> 10.2 managing client expectations by clearly establishing with the client what the paralegal will do or accomplish and at what cost, and
>
> 10.3 being clear about what the client expects, both at the beginning of the retainer and throughout the retainer.[47]

Regardless of how a legal opinion and professional judgment are expressed, either in writing or orally, the paralegal must carefully and clearly communicate ADR options with the client. Any recommendations about ADR should be provided not only at the commencement of the retainer but also during the course of the retainer. As knowledge of the facts and issues evolves in a case, both the client and paralegal may find that outcomes anticipated at the outset of the retainer change. In particular, the client's expectations can alter drastically due to a number of factors. At the outset of a legal action, some clients firmly believe that they want to "have their day in court" and will "go all the way to the Supreme Court of Canada" to resolve their case. They are emotionally attached to their position and do not necessarily understand the impact of going to court in terms of the costs, as well as the impact on future relationships with the opposing party. They have little experience or understanding of the harsh realities of taking an action to court.

Another factor that can affect the application of ADR is information or a lack thereof. It takes time to gather all the facts of a case in order to consider the possibility of a negotiated settlement. Many cases are simply not ready to contemplate any possible settlements early in the case. Mediation for a legal action regarding a motor vehicle accident, for example, would likely not be appropriate until the parties have obtained a doctor's report clearly outlining the injuries of the plaintiff.

Similarly, paralegals need to consider these same factors as part of communicating any ADR recommendations to the client during the course of the retainer. For example, mediation would not be appropriate at the early stages of a legal action when not enough information is available, but it might be beneficial at later stages.

In addition, when considering whether to proceed with mediation or negotiation, paralegals should be aware of **sharp practice** from the opposing counsel that may seek mediation as a means of trying to obtain an advantage by using dishonourable means. This includes tactics such as attempting to raise the overall legal costs to the party by scheduling mediation when the parties are clearly not ready or prepared to reach a settlement. Some may utilize it as a delaying tactic by sending opposing clients who do not necessarily have the proper authorization to enter into a settlement, such as a junior-level employee who is representing the client on behalf of the party who is a company. Specifically, Rule 7.01 of the *Paralegal Rules of Conduct* reinforce the general professional courtesy that legal representatives are expected to follow.

sharp practice
when a paralegal obtains, or tries to obtain, an advantage for the paralegal or client(s), by using dishonourable means

> (1) A paralegal shall avoid sharp practice and shall not take advantage of or act without fair warning on slips, irregularities or mistakes on the part of other licensees not going to the merits or involving the sacrifice of a client's rights.
>
> (2) A paralegal shall agree to reasonable requests concerning trial dates, adjournments, waiver of procedural formalities and similar matters that do not prejudice the rights of the client.

manner that is abusive, offensive, or otherwise inconsistent with the proper tone of a professional communication from a paralegal.

(4) A paralegal shall not engage in ill-considered or uninformed criticism of the competence, conduct, advice or charges of other licensees, but should be prepared, when requested, to represent a client in a complaint involving another licensee.

(5) A paralegal shall answer, with reasonable promptness, all professional letters and communications from other licensees that require an answer, and a paralegal shall be punctual in fulfilling all commitments.[48]

SHARP PRACTICE

Fact Scenario

You have been contacted by the opposing party, a large company, to attend a mediation with your client. As you are preparing for the mediation, the opposing party discloses the name of the person who will be attending the mediation on behalf of the company. You quickly recognize the name of the person and realize that the person has a very junior-level position with that company.

Question for Discussion

What should you be concerned about with respect to the representative that the company is sending?

Advising Clients

Honesty and Candour

A paralegal has a duty to advise clients on matters that are relevant to the retainer. According to the *Paralegal Rules of Conduct*, a paralegal shall be honest and candid when advising clients (Rule 3.02(2)). Specifically, according to Guideline 7,

1. A paralegal has a duty of candour with the client on matters relevant to the retainer. A paralegal is required to inform the client of information known to the paralegal that may affect the interests of the client in the matter.
2. A paralegal must honestly and candidly advise the client regarding the law and the client's options, possible outcomes and risks of his or her matter, so that the client is able to make informed decisions and give the paralegal appropriate instructions regarding the case. Fulfillment of this professional responsibility may require a difficult but necessary conversation with a client and/or delivery of bad news. It can be helpful for advice that is not well-received by the client to be given or confirmed by the paralegal in writing.[49]

It goes without saying that a paralegal's job is a business, and the expectation is to earn a profit. The longer a client's matter is in conflict, the more legal services the client requires, and the more income that client's paralegal may earn. In situations where an hourly rate is applied by the paralegal, a paralegal may earn more money in an

48 *Supra* note 1, r 7.01.

49 *Supra* note 45, Guideline 7.

action that heads to court rather than to an early settlement through ADR processes. Nevertheless, a paralegal must not let their interests interfere with what is in the best interests of the client. Being honest and candid means that the paralegal must be truthful and forthright in advising their client about all matters, including options that may shorten the duration of a legal action or lower its cost, even if it might mean less profit for them in the long run. It is important that clients have a clear understanding of all possible outcomes. Guideline 7 specifies the following:

When advising a client, a paralegal

- should explain to and obtain agreement from the client about what legal services the paralegal will provide and at what cost. Subject to any specific instructions or agreement, the client does not direct every step taken in a matter. Many decisions made in carrying out the delivery of legal services are the responsibility of the paralegal, not the client, as they require the exercise of professional judgment. However, the paralegal and the client should agree on the specific client goals to be met as a result of the retainer.[50]

ADVISING CLIENTS

Fact Scenario

Sue is a newly licensed paralegal. She started her own firm, including hiring a part-time assistant and renting an office space. She is trying her best to market the new firm and generate new clients. One of her clients has submitted an application with the Human Rights Tribunal of Ontario. The client was fired as a result of her poor work skills. The client experienced a miscarriage six months ago. She was required to go back to work immediately, and has since experienced severe depression as a result of the miscarriage. Sue's client is claiming that the miscarriage should be considered a disability under the Ontario *Human Rights Code* and she should not have been fired. The mediation in this matter is scheduled next week. Sue feels that this would be a great case to argue at the tribunal and she could really start to make a name for herself. She is hoping that the matter does not settle at the mediation. In addition, Sue's monthly expenses seem to be piling up, and she would earn more legal fees if the matter continues to the hearing stage. Sue decides not to spend much time preparing or rehearsing for the mediation.

Question for Discussion

Discuss the possible ethical breaches in accordance with the Paralegal Rules of Conduct and other issues that may be of concern.

Confidentiality

Many clients that participate in ADR have concerns about the degree of confidentiality that may be experienced during these procedures. As a result, they may be less open to actively participating in ADR. This may be due to their perception of the more informal nature of ADR and a fear of revealing too much about their case during

ADR. A paralegal should inform and remind their clients of their duties with respect to confidentiality. The paralegal's duty of confidentiality is set out in the *Paralegal Rules of Conduct*:

> Rule 3.03(1) A paralegal shall, at all times, hold in strict confidence all information concerning the business and affairs of a client acquired in the course of their professional relationship and shall not disclose any such information unless:
>
> (a) expressly or impliedly authorized by the client;
>
> (b) required by law or by order of a tribunal of competent jurisdiction to do so;
>
> (c) required to provide the information to the Law Society; or
>
> (d) otherwise permitted by this rule.[51]

The duty of confidentiality commences at the very outset of the paralegal–client relationship, even prior to a retainer, and continues indefinitely after the paralegal has ceased acting for the client. This means it applies to all stages of the legal action, including ADR, and even applies to prospective clients, whether or not a paralegal–client retainer is engaged. In addition, it applies to all information acquired during the paralegal–client relationship, whether or not the information is relevant to the matter for which the paralegal is retained. This is reinforced in Guideline 8: Confidentiality. According to the *Paralegal Professional Conduct Guidelines*:

> 1. A paralegal cannot render effective professional service to a client, unless there is full and unreserved communication between them. The client must feel completely secure that all matters discussed with the paralegal will be held in strict confidence. The client is entitled to proceed on this basis, without any express request or stipulation.
>
> 2. A paralegal's duty of loyalty to a client prohibits the paralegal from using any client information for a purpose other than serving the client in accordance with the terms of the retainer. A paralegal cannot disclose client information to serve another client or for his or her own benefit.[52]

The paralegal must be sure to obtain clear instructions from the client as to what information the paralegal can disclose during any form of ADR. This can be done as part of the early preparation with the client ahead of any ADR process. This understanding will reduce risk to both the client and the paralegal during an ADR session. The client will be less likely to make a statement in error that may jeopardize their position. Having a clear understanding of the information the client wants to keep confidential will reduce the risk of the paralegal breaching the *Rules of Conduct* during ADR processes by stating something that the client wanted to remain confidential.

Settlement and Dispute Resolution (Rule 3.02)

The duty to clients in Rule 3 further requires that paralegals advise their clients about settlement and dispute resolution:

> (11) A paralegal shall advise and encourage a client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis, and shall discourage the client from commencing or continuing useless legal proceedings.
>
> (12) The paralegal shall consider the use of alternative dispute resolution (ADR) when appropriate, inform the client of ADR options, and, if so instructed, take steps to pursue those options.[53]

Commencing and settling legal proceedings are an important part of the paralegal's responsibilities to the client. At the outset of a retainer, the paralegal should assist the client in the decision of whether to begin a legal proceeding. Part of that decision will require a discussion about the various pros and cons of substantive and procedural law, discussed earlier in this chapter. However, as the proceedings continue, the paralegal should advise and encourage settlement as soon as reasonably possible. This can be achieved through the various forms of ADR discussed throughout this book, such as negotiation, mediation, arbitration, or similar means, instead of by going to litigation.

Early settlement may be successful through negotiation between the parties. To achieve this, the paralegal should first seek instructions from the client to make an offer of settlement to the other party as soon as reasonably possible. The opposing party may accept the offer or may counteroffer. The negotiations may continue back and forth until settlement is reached. According to Guideline 7:

> 10. In the course of the proceedings, the paralegal should seek the client's instructions to make an offer of settlement to the other party as soon as reasonably possible. After receipt of an offer of settlement from the other party, the paralegal must explain to the client the terms of the offer, the implications of accepting the offer and the possibility of making a counter-offer. When making an offer of settlement, a paralegal should allow the other party reasonable time for review and acceptance of the offer. The paralegal should not make, accept or reject an offer of settlement without the client's clear and informed instructions. To avoid any misunderstandings, the paralegal should confirm the client's instructions in writing.[54]

Not accepting a reasonable offer of settlement may expose the client to significant cost consequences. This concept is explored in more detail in Chapter 11, "Selecting the Right ADR Process."

For the client who is expecting to head to court, settlement at any stage of the proceeding may be difficult to comprehend. Clients are used to what they see on television or in the movies and expect a judge to ultimately resolve their dispute. There may be some disappointment from the client when the decision is settled without heading to court. Yet the reality is that the majority of cases settle before going to court. Therefore, it becomes the paralegal's responsibility to convey this reality to the client so they are comfortable with that outcome. There continue to be many provincial initiatives focused on encouraging settlement and resolving cases outside of court.

Can Paralegals Be Mediators?

Rule 2.01(6) recognizes that paralegals can also act as mediators. Traditionally, lawyers have often filled the role of a mediator. However, in recent years, as the demand for mediation has expanded, many others from different professions have also filled that

51 *Supra* note 1, r 3.03(1).

52 *Supra* note 45, Guideline 8.

53 *Supra* note 1, rr 3.02(11) and (12).

54 *Supra*

role, including psychologists, social workers, therapists, faith community leaders, and now paralegals. Some paralegals choose to turn mediation into their career, while others act as a mediator on a part-time basis while continuing their primary profession.

Leading a full-time career in mediation is possible and growing in a number of areas. A mediator may choose to work in private practice, specializing in a particular area such as commercial, family, or workplace mediation. Other mediators may choose to work for government organizations such as administrative tribunals and agencies. There are numerous government-based organizations at which paralegals are authorized to practise, such as human rights commissions (Canada and Ontario), the Landlord and Tenant Board, and the Workplace Safety and Insurance Board (Ontario). Still others may choose to work with private firms and organizations, such as school boards, universities and colleges, or other associations that use mediation and conflict resolution regularly.

The Paralegal Rules of Conduct and Paralegal-Mediators

Outside Interests

outside activity an activity that may overlap or be connected with the provision of legal services

For paralegals who wish to practise as mediators, the *Paralegal Rules of Conduct* determine how such an activity should take place. This practice is considered an **outside activity**, which Guideline 2 defines as an activity that may overlap or be connected with the provision of legal services. When participating in such activities, paralegals must carefully adhere to the Guidelines to ensure that the outside activity does not impair their ability to provide legal services to their clients. For example, if a paralegal is scheduled as a mediator in a mediation that involves the client in another matter, it may give rise to a conflict of interest. Either way, a paralegal that chooses to continue in another role, such as a mediator, must, according to the Guidelines, continue to fulfill their obligations under the *Paralegal Rules of Conduct*. This includes duties such as the following:

- act with integrity,
- be civil and courteous,
- be competent in providing legal services,
- avoid conflicts of interest, and
- maintain confidentiality.[55]

Whether the activity gives rise to a conflict of interest or causes any impairment, a paralegal would need to consider whether to withdraw from representation of the client or from the outside interest.

Conflict of Interest

The *Paralegal Rules of Conduct* state that paralegals, whether acting as mediators or not, must disclose any possible conflict of interest as soon as possible. The concern, according to Guideline 2, is that "[a] paralegal should not carry on, manage or be involved in any outside interest in such a way that makes it difficult to distinguish in which capacity the paralegal is acting, or that would give rise to a conflict of interest or duty to a client."[56] The Guidelines further explain:

> When acting as a mediator, the paralegal should guard against potential conflicts of interest. For example, neither the paralegal nor the paralegal's partners or associates should provide legal services to the parties. Further, a paralegal-mediator should suggest and encourage the parties to seek the advice of a qualified paralegal or a lawyer before and during the mediation process if they have not already done so. Refer to Guideline 9: Conflicts of Interest for more information on how a paralegal's outside interests may conflict with the paralegal's duty to his or her clients.[57]

In the event of a conflict of interest, the paralegal acting as a mediator should withdraw from the mediation process unless the parties unanimously consent to continue with the paralegal as mediator despite the conflict of interest. Nevertheless, in this situation, paralegals should always use their judgment to determine whether such a conflict of interest would impair their professionalism and ability to remain impartial. If at any point a paralegal-mediator determines that they can no longer remain impartial, they should withdraw from the mediation.

Acting as a Mediator

Once the paralegal chooses to act as a mediator, further rules are engaged to set out the responsibilities of the paralegal as a mediator:

> 2.01(6) A paralegal who acts as a mediator shall, at the outset of the mediation, ensure that the parties to it understand fully that the paralegal is not acting as a representative for either party but, as mediator, is acting to assist the parties to resolve the issues in dispute.[58]

The objective here is to ensure that there is no confusion on the part of the parties as to what role the paralegal has in the mediation. It is important for the parties to understand that a paralegal–client relationship does not exist, and that the paralegal acting as a mediator is not providing legal services or legal opinions to either party. Keep in mind that according to the Guidelines, "this does not preclude the mediator from giving information on the consequences if the mediation fails."[59]

OUTSIDE INTERESTS

Fact Scenario

You have been hired as a mediator in a personal injury case. You are also a partner with a paralegal firm and have had many years of experience dealing with personal injury cases. Clients continue to hire you as a result of your extensive experience.

55 *Supra* note 45, Guideline 2(4).

56 *Ibid* at 2(2).

57 *Ibid* at 2(6).

58 *Supra* note 1, r 2.01(6).

59 r.

Question for Discussion

As a mediator, what are your obligations according to the *Paralegal Rules of Conduct*? Be sure to reference the section numbers that may apply and describe their application.

Confidentiality

Like paralegals, mediators are required to keep any client information confidential unless the parties consent. For the paralegal-mediator, this responsibility not only is set out in the *Paralegal Rules of Conduct*, which the paralegal must follow, but also is included in other aspects of the mediation, including the mediation agreement prepared by the mediator. The mediation agreement clearly sets out the obligations of confidentiality that bind both the mediator and the parties involved during the mediation and subsequent to the mediation. Any information that the parties may discuss while in caucus is confidential unless the parties involved consent to disclosure. Any information about the mediation itself, such as any information and documents during the mediation and post-mediation, is confidential. Parties choose mediation often because of its private nature. Mediators should inform the parties of this duty at the outset of the mediation and also in the mediation agreement.

CONFIDENTIALITY

Fact Scenario

You are a paralegal representing a client in a mediation in a landlord and tenant matter. Your client is the tenant in this dispute who is defending an application by the landlord about unpaid rent. The client has told you that he would like to do everything possible to stay in the apartment, and has some money set aside to pay the rent for the next three months. He was behind a week every month only because of the timing of when he was paid. However, he recently found out that his workplace, which has been under significant economic strain, may be cutting employees, and he may be one of them. He does not want the landlord to know about the fact that he may be unemployed. He is concerned that, because the mediation is informal, the information may be used against him and he will be kicked out of his apartment.

Question for Discussion

What can you do to assure your client that both you and the mediator will keep all information and documents confidential?

RECURRING CASE STUDY

Angela is a student who lives in the basement apartment of a house owned by her landlords, Mary and Leo. Angela has lived in the apartment for the past nine months while attending college. Overall, Mary has been happy with the living arrangement and her landlords are much nicer and more reasonable than her previous landlord. This apartment is quiet and Angela has a lot of privacy so that she can concentrate on her school work. The rent is reasonable and within her very limited budget. She has also found Mary to be easy to talk to when any minor issues arose.

Mary and Leo began renting out their basement apartment earlier this year. They needed some extra income and Mary likes knowing that someone else is in the house when Leo goes away on business. Both Mary and Leo like their current tenant, Angela. She is always on time with her rent, is very polite, and seems to be trustworthy.

Last month, there was a leak that completely flooded one of the closets in the basement. Unfortunately, there was water damage to Angela's personal belongings, including her special, prized competitive figure skates. Angela would like to be compensated approximately $1,000 for all of the damage, stress, and inconvenience. She has obtained a written estimate that it would cost $600 to replace the skates alone.

Mary was shocked that her tenant asked for $1,000 to cover the damages that she had suffered. She spoke to Leo about it and he insisted that skates cost less than $100 and said that Angela is trying to take advantage of them.

Leo ended up offering Angela $60 so that she could buy a new pair of skates at Canadian Tire. Angela was offended by the insulting offer. She has temporarily borrowed a pair of skates from a friend, but really needs her own pair of customized figure skates as soon as possible because her next skating competition is just six weeks away.

Angela is considering taking the matter to small claims court, but she doesn't know anything about law and she cannot afford to hire a lawyer. Her lease will be up in three more months, but she had hoped to extend the lease because she still has two semesters before she finishes her college program.

The parties have not decided whether they will continue with this living arrangement—it will depend upon on the outcome of this dispute.

Discussion of Scenario

- Retaining a Paralegal: If Angela cannot afford to hire a lawyer, she could consider representing herself. However, since Angela doesn't know anything about law, a paralegal would be an affordable option.
- Consider ADR: It would take too long to get a small claims court date since Angela needs the money to replace the skates as soon as possible. She should discuss ADR options with her paralegal.
- Quick Resolution with Lower Cost: The paralegal will likely suggest negotiation or mediation as good options for Angela to consider in an effort to resolve this dispute. Both of these processes have the potential to resolve the matter quickly and at a lower cost than going to court.

CHAPTER SUMMARY

Over the last 30 years, significant changes to the justice system have affected the way legal services are delivered and used. Economic and societal pressures have led to a "corporatization" of lawyers and law firms, reduced numbers of sole practitioners, and resulted in excessive legal fees and increasing costs and delays for trials to resolve disputes. The consequence of these changes in the legal industry has been significant. Hardest hit have been average Canadians who can no longer afford to access the justice system through the traditional methods of legal representation and adjudicative court systems. The COVID-19 pandemic has continued to highlight significant changes to the Canadian legal system both for the better and worse as legal services had to adapt to an online environment and delays grew.

Unfortunately, the traditional legal industry itself has been slow to respond and often reluctant to change. Many lawyers avoid using alternative methods such as mediation and seek to resolve disputes through the singular method of adjudication, much to the detriment of their clients.

As public pressure for access to justice continues to mount, the legal industry has responded in numerous ways to meet this demand. ADR methods are increasingly used to find affordable and effective ways to resolve disputes without going to court. The shift to problem-solving as a way of providing legal services is a significant development away from the traditional professional practice of "adversarialism." Similarly, the demand for paralegals has grown as people seek alternative service providers to lawyers and self-representation. This has in turn led to the regulation of paralegals in Ontario and the acknowledgment of paralegals as authentic participants in the legal system.

The licensing of paralegals by the LSO and the provision of legal services to clients give rise to important duties for the paralegal in the resolution of disputes. At a time when legal costs are excessive and scheduled court appearances are delayed for long periods, alternatives to resolving disputes are an important consideration and benefit for parties in the long run.

As a result, the regulatory framework of the paralegal profession is set up to ensure that paralegals inform, encourage, and implement the use of ADR methods. Beginning with the regulatory body of paralegals, the LSO recognizes that its primary duty is to protect the public interest. This duty is clearly reinforced in section 4 of the *Law Society Act*, which outlines the functions and principles of the LSO and its members. Based on the authority prescribed in the *Law Society Act*, paralegals must adhere to specific ethical obligations as set out in codes of conduct and other statutory regulations. Specifically, the *Paralegal Rules of Conduct* set out the professional and moral standards that paralegals are expected to follow. The Rules further aim to ensure that paralegals observe professional conduct that includes ADR methods.

Despite current changes to the legal industry, much needs to be done to continue the trend away from advocacy and toward the encouragement of settlement. In order to improve access to justice, changes need to be reinforced at the earliest stages of education and training of legal representatives. Proper education and training in ADR can shape professional attitudes and help practitioners develop crucial conflict resolution skills. The hope is that in a growing industry of ADR, by providing legal representatives with these skills, they will be better prepared to meet the needs of all Canadians.

KEY TERMS

access to justice, **8**
alternative dispute resolution (ADR), **2**
code of ethical conduct, **18**
competent paralegal, **19**
judicial mediation, **13**
Law Society of Ontario (LSO), **2**
legal opinion, **20**
mediation, **12**
outside activity, **26**
procedural law, **20**
professional conduct, **16**
professional judgment, **20**
rights-based model, **3**
Rules of Professional Conduct and *Paralegal Rules of Conduct*, **2**
self-regulated body, **16**
sharp practice, **21**
substantive law, **20**

REVIEW QUESTIONS

1. Describe how a rights-based model of justice has slowed the change to employ methods of alternatives to adjudication.
2. Outline and describe the economic and social changes in the legal profession that have led to the increasing use of ADR practices.
3. What programs has our legal industry provided in response to the need to provide more alternatives to our justice system and improve the public's access to justice?
   a. Case management.
   b. Legal Aid Ontario.
   c. Pro Bono Law Ontario.
   d. Mandatory mediation.
   e. All of the above.
4. Differentiate between the terms *access to justice* and *access to courts* and describe why they are different.
5. Describe why lawyers and judges were reluctant to embrace mediation as a mandatory part of the litigation process.
6. What are the possible roles and methods of participation of a paralegal within the ADR process?
   a. Paralegals can act in support of a lawyer as they do in other litigation matters.
   b. Paralegals can also act as third-party facilitators, arbitrators, or mediators.
   c. Paralegals can represent their own clients in many ADR proceedings.
   d. All of the above.
7. What is *judicial mediation*? Describe how it is used as a method of ADR in our legal system.
8. How has the global pandemic affected the delivery of legal services in Canada?
9. Discuss the impact of the *R v Jordan* decision on criminal trials.
10. What legislation provides the LSO with the power and authority to regulate the legal profession in Ontario?
11. What are the guiding principles of the LSO? Provide the statutory or other authority for your answer.
12. The LSO is considered a "self-regulated body." Describe what that means and how such a body would function.
13. As members of the LSO, paralegals must adhere to professional and ethical obligations. List the various authorities that set out those obligations.
14. Define a code of conduct and list the elements of the code of conduct that applies to paralegals and to lawyers. Describe the purpose of that code of conduct as it relates to paralegals.
15. Which specific sections of the Paralegal Rules of Conduct make reference to ADR?
16. Describe and distinguish between substantive and procedural law.
17. Generally, when should ADR be considered during the litigation process? Describe the advantages and disadvantages and what factors should be considered in your answer.
18. What is the paralegal's responsibility with respect to the client and settlement?
19. Can a paralegal be a mediator? Provide the statutory or other authority for your answer.
20. You have been hired as a paralegal to represent a new client and bring an action before the small claims court. At issue is the fact that your client was hired to renovate a house, and the owner has refused to pay him saying that it was "shoddy workmanship." Your client is quite angry and is eager to take this case "all the way to the Supreme Court of Canada" if he has to. You decide to file the claim immediately without properly discussing the possible courses of action with your client. Discuss the possible ethical breaches in accordance with the Paralegal Rules of Conduct.

EXERCISES

1. Position Activity: Take a Stand (see Appendix B)
2. Negotiation Role Play: Sell That Stroller (see Appendix C)

Law Society Act, RSO 1990, c L.8

Interpretation

1(1) In this Act, ...

"person who is authorized to provide legal services in Ontario" means,

(a) a person who is licensed to provide legal services in Ontario and whose licence is not suspended, or

(b) a person who is not a licensee but is permitted by the by-laws to provide legal services in Ontario;

• • •

Provision of legal services

(5) For the purposes of this Act, a person provides legal services if the person engages in conduct that involves the application of legal principles and legal judgment with regard to the circumstances or objectives of a person.

Same

(6) Without limiting the generality of subsection (5), a person provides legal services if the person does any of the following:

1. Gives a person advice with respect to the legal interests, rights or responsibilities of the person or of another person.
2. Selects, drafts, completes or revises, on behalf of a person,
   i. a document that affects a person's interests in or rights to or in real or personal property,
   ii. a testamentary document, trust document, power of attorney or other document that relates to the estate of a person or the guardianship of a person,
   iii. a document that relates to the structure of a sole proprietorship, corporation, partnership or other entity, such as a document that relates to the formation, organization, reorganization, registration, dissolution or winding-up of the entity,
   iv. a document that relates to a matter under the *Bankruptcy and Insolvency Act* (Canada),
   v. a document that relates to the custody of or access to children,
   vi. a document that affects the legal interests, rights or responsibilities of a person, other than the legal interests, rights or responsibilities referred to in subparagraphs i to v, or
   vii. a document for use in a proceeding before an adjudicative body.
3. Represents a person in a proceeding before an adjudicative body.
4. Negotiates the legal interests, rights or responsibilities of a person.

Representation in a proceeding

(7) Without limiting the generality of paragraph 3 of subsection (6), doing any of the following shall be considered to be representing a person in a proceeding:

1. Determining what documents to serve or file in relation to the proceeding, determining on or with whom to serve or file a document, or determining when, where or how to serve or file a document.
2. Conducting an examination for discovery.
3. Engaging in any other conduct necessary to the conduct of the proceeding.

Type: Position Activity

Participants: Each student working with a partner

Level of Difficulty: Introductory

Time: Set aside approximately 20 minutes for this activity, including 10–15 minutes for the questions and answers and 5–10 for the debrief.

Objectives

- Introduce ADR and conflict.
- Allow participants to take a position and discuss the reasons (interests) why they took that position.
- Allow students an opportunity to take a position and understand the reasons "why" they are taking it.
- Begin to understand the reasons for positions and how they are similar to conflict.

Procedure

- Can be used as an in-person activity or virtual in breakout groups of two people.
- Use an open area large enough for people to move freely on two sides of an imaginary line in the middle of the room.
- The educator instructs the groups by saying the following: "I am going to ask a few questions that require students to choose a position on a particular topic. Each side of the room will be assigned a particular position on that topic." Then ask students to move to the side of the room that most applies to them.
- After students have moved to the position, casually ask students why they took a certain position and what motivated them.
- You can go as long as you would like with this activity. The point is to get people talking about why they took certain positions (e.g., finances, culture, education, family).

Questions to Get You Started

The educator asks, "What is your preference?" between:

- tea or coffee
- beer or wine
- dog or cat
- car or bike
- breakfast or no breakfast
- sugar or salt
- chocolate or chips
- meat eater or vegetarian
- morning person or night hawk
- introvert or extrovert
- city living or country living
- homework or no homework
- Tim Hortons or Starbucks
- thrift shop or name brand shop
- book or movie person

Debriefing with Students:

- Ask the students what the factors led them to take a certain position. What motivated them to take that position?
- They should begin to list the following:
  - Beliefs/values/morals
  - Religion
  - Background
  - Personal life/experiences
  - Expectations
  - Finances
  - Environment
  - Experiences
  - Physical state
  - Education
  - Culture
  - Convenience
- Ask students why we have conflict. What are the main causes of conflict in the world?
- Point out to students that the two lists are very similar. Often the positions we take lead us to conflict.
- Advise students that conflict will be explored in the next class.

Appendix C Role Play: Sell that Stroller Negotiation

Type: Negotiation Role Play

Participants: Two Parties

Level of Difficulty: Introductory

Time: Set aside approximately 30–40 minutes for this activity, including 5 minutes to read, 20 minutes for the negotiation, and 5–10 minutes for the debrief.

Objectives

- Conduct a simple negotiation without any prior instructions about negotiation.
- Refer back to this negotiation following future lessons and role plays for comparison purposes.

Procedure

- Ask students to break out into groups of two (should be different partners for every activity).
- Each group of two should select a role as either buyer or seller.
- Begin negotiation with minimal instructions:
  1. Read the role play: 5 minutes.
  2. Negotiate a potential agreement: 15 minutes.
  3. Debrief: 10 minutes.

Debriefing with Students

- Ask students to share their group's settlement agreement.
- Discuss the interests of both the buyer and seller. Determine which ones are compatible. Draw up a list for all the students to see.
- What factors influenced the buyer and seller? What was important to them?
- Why is there a range in the prices and settlements that different groups reached?

Sell that Stroller

Buyers: Asmita and Neelabh

Asmita and Neelabh are expecting their first child. They would like to buy a stroller for their new baby. They live in a small town that is quite a distance from the big city. They are a new couple, and money is quite tight these days. They have a lot of items that they need to buy for the baby. They decide that they can only afford to buy a used stroller. However, safety is a huge priority and they have heard that some older models may not meet current safety standards. The baby's due date is in less than a month, so they need to find something quickly. They heard about a store that sells new and second-hand strollers called Go Baby. Inside the store, they notice that there are all kinds of new strollers with a variety of features. Most are new, with very few used strollers. The new ones are quite pricey. There are some shops nearby that sell new strollers but they would likely be out of their price range. Asmita notices one in the corner that is quite dusty. The stroller is made by Prego and seems to be an older version. There is not a price listed on the stroller. Asmita fondly remembers the stroller that her mom used in her childhood with her siblings that was made by Prego. It seemed to last forever. She knows from the flyers she has seen that most strollers cost around $400. Asmita checked Kijiji before coming to the shop and found that many used strollers are usually half the price of a new one. However, this one is a much older model and likely has been sitting there for a while. Asmita and Neelabh would like to negotiate a good price for the used Prego stroller. As new buyers, they do not want to be taken in this deal. If they do not buy a stroller here, they would have to drive an hour and a half into the city. Gas prices have risen lately and their vehicle is not good. It would likely cost them $100 in gas alone!

Seller: Maurice, Go Baby

Maurice started Go Baby a few years ago after having his own kids and realizing there was a huge market for new and used baby gear. He does have some concerns about selling used strollers and always makes sure that the strollers meet the current safety standards. However, he is finding that most new parents want the newest stroller on the market and that there is not a big market for older strollers even if they meet the safety standards. Maurice would like to clear out any older stroller models as soon as possible, and move the inventory. His shop is filling up and they are taking up too much space. At 8 p.m., a couple enters the store (Asmita and Neelabh) and inquires about the old used stroller in the corner. Maurice thinks this is his lucky day since he would really like to sell the Prego stroller as it is an eyesore in his shop. He bought the used stroller for $200 from a distributor. A few months after he bought the used stroller, Prego suffered some bad press due to some stroller recalls and he has not been able to sell it since. He would like to sell the stroller that has been sitting in his store now for three years. Three years ago Maurice did a maintenance check on it, but has not done one since then. Every penny counts, so he would like to sell the stroller for a profit or at least not lose his money. Maurice also knows that the stroller is an older model and he is not sure when he would get another interested buyer. However, he would rather do without the sale then sell it for less than he bought it for. The closest used stroller store is in the big city—at least an hour and a half drive

Understanding Conflict

2

Learning Outcomes

After reading this chapter, you will be able to:

- Understand the meaning of conflict.
- Appreciate the impact that conflict has on our lives.
- Recognize the positive aspects of conflict.
- Identify how conflict can develop.
- Understand the different styles for dealing with conflict.
- Identify your own dominant style for managing conflict.
- Recognize when it is appropriate to use the various conflict resolution styles.
- Apply the concepts from this chapter to a recurring conflict case scenario.

Introduction

Conflict is a word that we hear on a regular basis, but we rarely take the time to consider its meaning or to understand the impact that it has on our lives. Achieving a true understanding of conflict can help to make sense of actual disputes for yourself and for your clients. Additionally, trying to understand other perspectives, such as an opposing party's view, will help to develop strategies in order to better manage conflict situations and effectively represent a client's interests.

This chapter explores conflict, examines the various conflict resolution styles that are commonly used to deal with it, and outlines some of the benefits associated with resolving conflict outside of the courtroom. The content will help legal professionals to develop an awareness of their own style of conflict resolution and how it can relate to future work in the legal field.

What Is Conflict?

A fight, a disagreement, an argument ... all common words that are used to describe conflict. Conflict can refer to some type of opposition: a battle, a physical confrontation, or even a war. Conflict could describe a situation that brings about raised tempers, loud voices, and physical force, or it could be a situation that is ultimately resolved peacefully and productively.

Theoretical Definitions of Conflict

Over the years, conflict resolution theorists have put forth various definitions of conflict. According to Fisher, conflict can be defined as "a social situation involving perceived incompatibilities in goals or values between two or more parties, attempts by the parties to control each other, and antagonistic feelings by the parties toward each other."[1] Both Skjørshammer and Ellis and Anderson focus on the feelings associated with conflict, suggesting that it "occurs when an individual or group feels negatively affected by another individual or group"[2] and that conflict is "characterized by mutual feelings of hostility."[3] Wieviorka suggests that conflict is "what happens when the interests of individuals or of groups are antagonistic and they are in conflict for status or power."[4]

A common theme among these definitions is that each has a negative connotation, referring to antagonistic or hostile feelings. This implies that conflict itself is a negative social interaction. However, this implication is not necessarily correct. Although common emotions experienced during conflict can range from anger and despair to indifference, conflict is not, in essence, negative. In fact, conflict is necessary in our society because it can help to bring about change and working through a conflict situation allows us to make progress. As suggested by McCorkle and Reese, safely managed conflict can stimulate creativity and lead to personal and societal change.[5] This view is supported by Heft, who indicates that conflict with a bit of chaos can be healthy in the long run, as it encourages re-evaluation and a new sense of order.[6] We would live in a very stagnant society with little advancement if we did not have the opportunity to raise, and respond to, various conflicts. For example, social justice activists who feel that it is time to challenge the status quo may initially face conflict in their efforts to bring about change.

Conflict can be viewed as a positive force because it allows us to improve relationships by addressing issues and working through problems. Mayer believes that conflict provides an opportunity for the parties to learn more about themselves, the other parties, and the issues involved.[7] As such, conflict itself is not negative; our lack of effective conflict resolution skills and inappropriate reactions to conflict make people perceive it as negative.

Conflict is inevitable. Lederach describes conflict as a normal and continuous dynamic within human relationships.[8] We cannot eliminate conflict from society, but if we take appropriate steps to properly deal with issues, apply the necessary skills, and exercise tolerance and patience, we can recognize that conflict plays a critical role in our society.

For the purpose of this book, **conflict** can be defined as a state of disharmony resulting from opposing views or incompatible positions and interests. Keeping in mind that conflict is not necessarily negative and it is needed in order to make progress.

conflict
a state of disharmony resulting from opposing views or incompatible positions and interests

How and Why Conflict Happens

Conflict affects everyone. At any stage of life—from young children to teens, adults, and the elderly—conflict can happen when there is an incompatibility in the fulfillment of interests, needs, or goals. Conflict can occur whenever something or someone prevents us from getting what we want. The other party to a conflict could be a friend, family member, acquaintance, or complete stranger; it could even be a corporation or the government. It could be someone with whom you have an interpersonal relationship, a professional relationship, a contractual relationship, an employment relationship, or no relationship at all. The other party is simply someone who has an opposing position and differing underlying interests from your own. As explained by Ewart, Barnard, Laffier, and Maynard:

> All people occupy the same Earth, but each of us inhabits a separate perceptual reality. How individuals, families, countries, and cultures make meaning in their lives varies radically. No matter what value, principle, or belief we select as sacred, we must accept that others will see things differently.[9]

1 RJ Fisher, *The Social Psychology of Intergroup and International Conflict Resolution* (New York: Springer-Verlag, 2012) at 9.

2 M Skjørshammer, "Co-operation and Conflict in a Hospital: Interprofessional Differences in Perception and Management of Conflicts" (2001) 15:1 J Interprof Care 7 at 10.

3 D Ellis & D Anderson, *Conflict Resolution: An Introductory Text* (Toronto: Emond Montgomery, 2005) at 9

5 S McCorkle & M Reese, *Mediation Theory and Practice* (Boston: Pearson/Allyn and Bacon, 2004).

6 L Heft, "The Mouse and the Earthquake: An Introduction to Systems Theory" (2006) 17.8 Systems Thinker 2 at 2.

7 B Mayer, *The Dynamics of Conflict Resolution: A Practitioner's Guide* (San Francisco: Jossey-Bass, 2012) at 120.

8 JP Lederach, "Conflict Transformation" in G Burgess & H Burgess, eds, Beyond Intractability (Boulder: Conflict Information Consortium, University of Colorado, 2003), online: <http://www.beyondintractability.org/essay/

Ineffective Responses to Conflict

Conflict does not have boundaries based on demographic or cultural identifiers, nor is it limited to people—all species of animals can have conflicts; countries can have conflict. Conflict can take place at home, at work, at school, on public transit, in the mall, or anywhere else. Some conflicts are internal conflicts within ourselves, while others are external conflicts that involve multiple parties. Essentially, "[c]onflict is pervasive in human interaction; thus, everyone is constantly involved in conflict resolution."[10] In essence, conflict is inevitable.

At times, conflict can be resolved by the parties themselves if they possess the necessary skills, resources, and willingness to deal with the issues. Unfortunately, the average person does not typically deal with conflict in an effective manner. Ineffective responses to a conflict situation can include yelling, blaming, threatening, or refusing to speak to the other person who is involved in the dispute. Equally ineffective are emotional outbursts, such as anger. According to Barsky, "[a]nger is one of the most pervasive emotions in conflict situations."[11] It can influence us to make destructive responses and make hurtful comments when we do not intend to do so. Using unproductive strategies for dealing with conflict can be a waste of time, money, and resources. Further, these ineffective techniques can cause stress to relationships and damage to each party's physical and psychological well-being. The courtroom, under the authority of a judge, is often the last resort for trying to resolve a conflict. However, court is not necessarily the best place to resolve conflict because it pits the parties against each other.

Opposing positions may be shaped by a number of different personal, social, and cultural influences, which can make it difficult to resolve the matter without professional intervention from a conflict resolution practitioner (e.g., a mediator or arbitrator) or a legal professional (e.g., a lawyer, paralegal, or judge).

10 AE Barsky, *Conflict Resolution for the Helping Professions* (New York: Oxford University Press, 2017) at 23.

11 *Ibid* at 29.

Involvement of Legal Professionals

Legal professionals become involved with a client's conflict situation either when the client decides to confront an issue (e.g., by commencing a lawsuit against another party) or when the client is forced to deal with an issue (e.g., when charged with an offence or required to respond to a claim). By the time parties have opted to seek legal advice, they have usually exhausted all other strategies for dealing with the issues and as a result have become firmly entrenched in their positions, which can trigger a range of emotions and reactions. Fortunately, a legal professional can play a critical role in resolving these matters, appropriately, to arrive at the best possible outcome (e.g., negotiating a settlement or making submissions for a lesser penalty).

In providing legal representation, a legal professional takes on the client's conflict by fulfilling their **fiduciary duty** to act in the client's best interest. This may mean trying to arrive at a settlement or proceeding to litigation in order to advocate for the client's position. However, it can be challenging for a legal representative to fully understand a client's situation, to appreciate their perspective, and to recognize the associated emotions that are being triggered by the conflict. Representatives will be more successful in moving clients toward a settlement if they can understand and deconstruct the conflict in a way that helps the client to see the situation from other perspectives and by utilizing alternative dispute resolutions (ADR) or online dispute resolution processes.

fiduciary duty
a duty that requires legal professionals to put their client's interests ahead of their own

PRACTICE TIP

Legal Representative as Conflict Resolver

The job of a legal representative is to resolve conflict in the best way for the client. This may include negotiation, mediation, arbitration, litigation, or refraining from commencing a legal action.

While the role of a legal representative may involve a range of responsibilities, at the end of the day, a legal representative should be viewed as a "conflict resolver." They must guide their client through the resolution process by presenting them with options, reviewing the benefits and consequences of each option, and by making a recommendation to their client as to which pathway to follow. Of course, the final decision is always ultimately made by the client.

Resolving Conflict

Most people have had a conflict situation that they wish they had handled differently, or have said something that they wish they could take back. It is not uncommon to have a situation that, if it were possible, they would like to do over again. When dealing with situations in the "heat of the moment," we do not always behave our best or deal with things as rationally as we should. Conflict resolution tends to work best when parties use a proper approach and are in the right state of mind to have a reasonable discussion.

Conflict Resolution Styles

dominant style the way a person naturally and instinctually deals with conflict

Different people deal with conflict in varying ways. Some people confront conflict head-on, while other people tend to shy away from turbulent situations. In dealing with conflict, each person has a **dominant style** for managing conflict. This is not necessarily the most effective style, but it is the default, natural strategy that tends to emerge when that individual is faced with a conflict situation. A person's dominant conflict management style may change over time and with experience. For example, getting older may change a person's level of aggressiveness when faced with conflict. Their dominant style may also change to suit the situation; many people will use a different style when in conflict with different people (e.g., an aggressive style with a sibling, but a passive style when dealing with an elderly grandparent) or might change their style depending on the environment (e.g., one style in the workplace and another style at home).

Thomas-Kilmann Conflict Mode Instrument (TKI) a questionnaire developed to measure conflict management styles

competing a conflict management style in which one party strives to win at all costs

compromising a conflict management style that involves reducing expectations and getting only a portion of what was originally sought

accommodating a conflict management style that tends to make sacrifices for the other party to the dispute

avoiding a conflict management style in which a party resists dealing with the issues in the dispute

collaborating a conflict management style characterized by working with the other party to problem-solve and develop creative solutions

A person's development of a dominant style for resolving conflict can be partly based on past experiences, including both successes and failures in dealing with conflict. It can be attributed to personality, such that a shy and introverted person would rarely have an overbearing or aggressive conflict management style. It can also be learned from a person's cultural environment and by observing how conflict is addressed by their own family. Regardless of how it is developed, it is helpful for individuals to know and understand their dominant, or natural, approach in dealing with conflict situations and to be able to recognize which styles are present in others. According to Barsky, "by assessing your own conflict style, you can develop greater control over how you respond to particular conflict situations, ... by assessing others' conflict styles, you can determine appropriate interventions."[12]

Legal professionals will encounter clients who display a specific way of dealing with conflict situations, and they will want to know the best way to support those clients. There will also be different styles from opposing parties and their representatives. Identifying an opponent's style will help to formulate a plan as to how to communicate and how to respond.

In order to determine the style that you tend to use most often (i.e., your dominant style), complete the questionnaire in Figure 2.1. Then, determine your score by using the criteria provided in Figure 2.2.

Thomas-Kilmann Conflict Management Styles

The **Thomas-Kilmann Conflict Mode Instrument (TKI)** is a well-known tool that is used to measure conflict management styles.[13] Similar to the questionnaire you completed in Figure 2.1, the TKI divides conflict management styles into the following five categories: **competing**, **compromising**, **accommodating**, **avoiding**, and **collaborating**.

12 *Supra* note 10 at 38.

13 The Thomas-Kilmann Conflict Mode Instrument is available for purchase through the official website: <https://kilmanndiagnostics.com/overview-thomas-kilmann-conflict-mode-instrument-tki>.

FIGURE 2.1 Questionnaire: Determining Your Dominant Conflict Resolution Style

Read each statement below and indicate whether that statement describes the way you feel about dealing with conflict.

		YES	NO
1.	I like to let others take the responsibility for solving issues that arise.	☐	☐
2.	I try to win whenever there is a disagreement.	☐	☐
3.	I like to understand where the other person is coming from in a disagreement.	☐	☐
4.	I don't mind giving in if it would make the other person happy.	☐	☐
5.	I think meeting halfway is a great way to solve a problem.	☐	☐
6.	When I see a conflict arise, I'd prefer not to get involved.	☐	☐
7.	It is important to me to voice my views.	☐	☐
8.	I like to work with others when problem-solving.	☐	☐
9.	I often sacrifice what I want for what other people want.	☐	☐
10.	I don't mind giving in a little if the other person does as well.	☐	☐
11.	I try not to stay away from disagreements and arguments.	☐	☐
12.	I go after my goals firmly. I don't back down from arguments.	☐	☐
13.	I feel that I can learn from others and hope that they can learn from me.	☐	☐
14.	It is important to me to preserve the relationship when I am in a conflict situation.	☐	☐
15.	It is important to me that the solution is fair to everyone involved.	☐	☐
16.	I like to wait until tensions have blown over.	☐	☐
17.	I will make sure that the other person hears my position.	☐	☐
18.	I like to make sure everything is discussed thoroughly.	☐	☐
19.	If it is important to the other person, I don't mind giving in.	☐	☐
20.	I feel satisfied if some of my concerns are resolved in a dispute.	☐	☐
21.	I rarely confront people when I am upset.	☐	☐
22.	I like to get my way.	☐	☐
23.	I try to work through issues that arise.	☐	☐
24.	What the other person is seeking is more important than what I want.	☐	☐
25.	I will often suggest that my opponent and I split the difference when we are in dispute.	☐	☐
26.	Sometimes I refrain from giving my opinion so that I don't have to deal with the people who disagree.	☐	☐
27.	Accomplishing my goal is very important to me at any cost.	☐	☐
28.	I like to find solutions that satisfy the concerns of everyone involved.	☐	☐
29.	I don't mind putting other people's needs ahead of my own.	☐	☐
30.	A successful resolution would mean that I get at least some of what I was seeking.	☐	☐

FIGURE 2.2 Scoring: Determining Your Dominant Conflict Resolution Style

Which Questions Did You Respond "YES" To?						Total "YES" Responses in Each Row	Row Letter Code
1	6	11	16	21	26		A
2	7	12	17	22	27		B
3	8	13	18	23	28		C
4	9	14	19	24	29		D
5	10	15	20	25	30		E

COMPETING

The competing style is characterized by a strong desire to "win" or to "be right." Hamelinck and Bjorkquist describe competitors as the people who "will fight to the finish to accomplish their personal goals and, in the process, care little or nothing about their relationships with others."[14] Typically, competitors are seen to be extremely aggressive—they are willing to do anything to accomplish their own goals. Competitors are also often seen to be uncooperative, because they are not relationship-oriented when dealing with conflict. Many competitors are willing to sacrifice the relationship in order to accomplish their goal. Often, when a competing style is used, it will produce a win–lose result because a competitor will not back down until they achieve their desired result—a victory.

COMPROMISING

The compromising style involves give and take, conceding on some of the issues, or a willingness to split the difference in an effort to come to a resolution. While, in a legal context, a compromise is typically viewed as a fair resolution, the term "compromised" can also be interpreted as a standard that is less than desirable (e.g., stating that a person's safety has been compromised suggests that their safety has been put at risk). Compromisers are somewhat goal-oriented but are also considered to be relatively cooperative, because they have a moderate concern for their relationships with other parties and also some concern for achieving their goal. Compromising can be considered a lose–lose resolution in the sense that neither party is able to achieve exactly what they were seeking.

ACCOMMODATING

Accommodating involves giving in to someone else, without resistance, in an effort to please and preserve the relationship. Accommodators will put the other person's needs ahead of their own. A person with an accommodating style values relationships and will sacrifice their own goals in order to help other parties achieve their goals. According to Barsky, accommodators have a "low concern for one's own needs and high concern for the needs of others."[15] While accommodators are considered to be highly cooperative, continually using this approach can also build resentment for a person who starts to feel as though they have been taken advantage of. Accommodating most often produces a win–lose situation: a win for the other party and a loss for the person who was eager to please by giving in.

14 D-M Hamelinck & B Bjorkquist, *Interpersonal and Group Dynamics*, 3rd ed (Toronto: Emond, 2019) at 137.

15 *Supra* note 10 at 39.

AVOIDING

Avoiders typically do not want to get involved in conflict and may intentionally ensure that they do not have an opportunity to face other disputants. Avoiders are seen to have low interest in cooperation because they are not willing to invest time in their relationships to fix problems. They are often viewed as having a low need to meet their own goals because they would rather not pursue issues that may cause conflict. However, it is not possible to effectively resolve a situation if it is not dealt with at all—even if a problem does seem to "go away," chances are it will resurface at a later date and become an even greater issue. Typically, those who avoid conflict "tend to satisfy neither their own needs nor the needs of others."[16] Avoiding is most likely to produce a lose–lose outcome in the sense that the conflict is never addressed.

COLLABORATING

The collaborating style is used when the participants are willing to put their differences aside, fully discuss the problem, consider different options, and attempt to develop a resolution that satisfies everyone's interests. A collaborator is someone who is non-aggressive and willing to work jointly with the other parties. Collaborators "have high concern for the person's own needs, as well as for the needs for others."[17] While collaboration involves investing a lot of time in the process, it tends to produce resolutions that are worth the effort. Conflict resolution theorists would suggest that we should all strive to be more collaborative in dealing with conflict, because the end result is often a win–win resolution.

SUMMARY OF THE STYLES

Figure 2.3 presents illustrations of the five conflict management styles using three examples: an interpersonal conflict over scarce resources (the last piece of cake), a paralegal representing a client who wants to recover an outstanding debt, and a paralegal negotiating with a prosecutor.

Figure 2.4 plots the five different conflict management styles to demonstrate where they fall on a cooperative/uncooperative continuum and an aggressive/non-aggressive continuum.

When to Use Each Style

Although most people have natural tendencies to typically use one dominant style for managing conflict, it does not mean that we are limited to using only our dominant style. It is important to realize that people can change the way that they respond to conflict by taking the time to assess the situation, and making a conscious choice as to which style they believe would be the most effective. Examples of when it is appropriate to use each of the conflict management styles are presented below.

16 *Ibid* at 38.

FIGURE 2.3 Conflict Management Style Examples

	Interpersonal Example: Who should get the last piece of cake?	Paralegal—Small Claims Example: How to resolve an outstanding $10,000 debt.	Paralegal—Provincial Offences Example: Speaking to the prosecutor about an offence notice.
Competing	I want the whole piece of cake for myself.	My client is entitled to the full amount paid immediately.	My client would like to fight this ticket and proceed to trial.
Compromising	Let's split the piece of cake in half.	My client will agree to split the difference and accept only $5,000.	My client is willing to plead guilty if you will agree to a joint submission for a reduced fine.
Accommodating	You can have the piece of cake.	My client is willing to allow as much time as you need to make payment and is willing to accept the amount that you think would be fair.	My client is willing to agree to any penalty that you think would be reasonable.
Avoiding	I don't feel like having cake (even if I really do).	My client will not discuss it with you.	My client does not want a trial date.
Collaborating	Why don't we consider other desserts that could be options instead of only cake?	My client would be willing to figure out a voluntary payment plan for the part of the debt that can be properly quantified or an alternate way to pay it back.	Would you be willing to withdraw the charge if I provide proof the headlight was repaired the same day as my client was charged?

COMPETING

The competitive style should be used when:

- the goal is to win
- when one of the parties knows that they are right or wants to stand up for their rights or beliefs
- the parties are not concerned about their future relationship.

The competing style is often seen in the courtroom when a legal representative tries to present the merits of a client's case and convince the presiding judge to rule in their favour. For example, if your client is served with a Plaintiff's Claim, but you can prove that the allegations are untrue, it would make sense to take a competitive approach in defending your client.

COMPROMISING

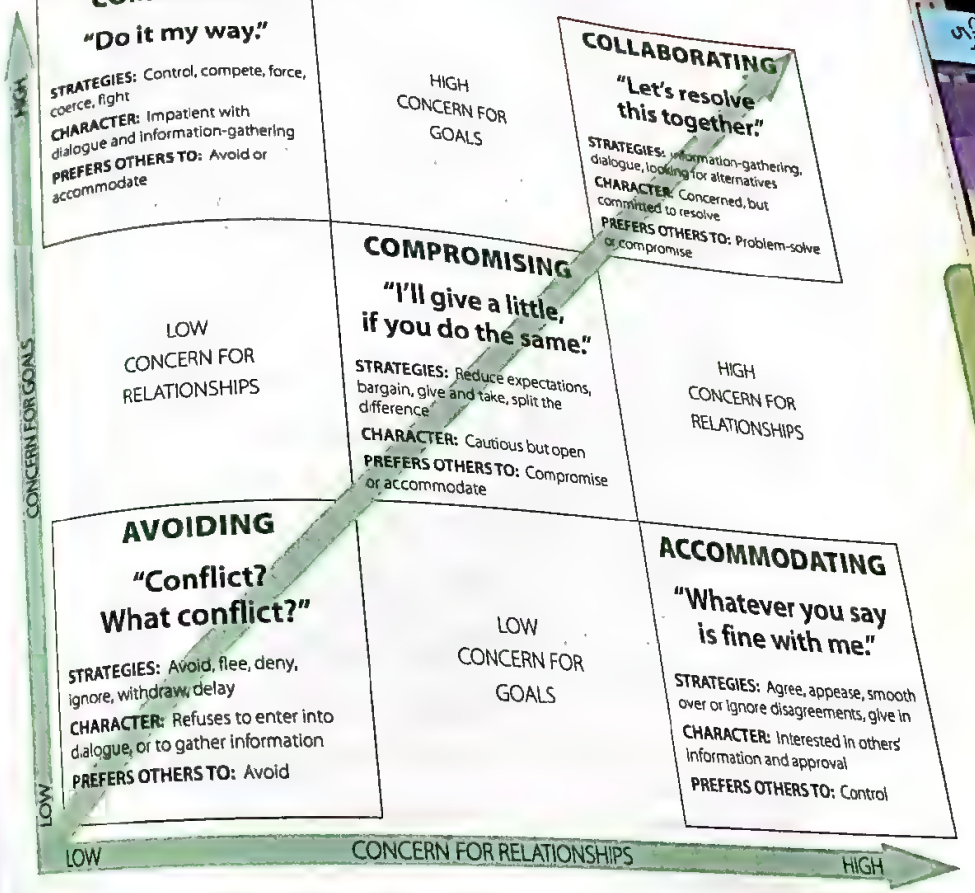
The compromising style is appropriate when:

- both parties are committed to trying to settle
- the parties have reached an impasse (i.e., are at a standstill)
- an agreement must be reached within a specified time frame.

The compromising style is commonly used as a last resort to achieve a quick resolution. For example, during a labour dispute with a strike deadline of midnight, union and management representatives may agree to split the difference on the remaining issues as the deadline approaches.

FIGURE 2.4 Approaches to Conflict

Framework originally developed by K Thomas and R Kilmann.



ACCOMMODATING

The accommodating style is effective when:

- one party realizes that their case is not as strong as the other side's case
- one party recognizes that they are wrong (and is willing to admit it)
- the parties do not want to prolong the conflict
- the relationship between the parties must be preserved.

Accommodation is often used in interpersonal conflicts in which the issue has less importance for the accommodating party.

AVOIDING

Avoidance is recommended when:

- the issue is not worth pursuing or there is little chance of success
- there is not an ongoing relationship between the parties
- a party feels they are in a delicate or dangerous situation and does not feel safe in speaking up
- there are a lot of emotions involved and the parties need a chance to cool off and calm down until they may be better able to deal with the situation.

Avoidance can be used in a range of situations in an effort to keep the peace and not stir up any issues. However, the danger in withholding opportunities to address or resolve issues can cause tensions to rise and ultimately lead to a more extreme response when too much emotion is held in (e.g., the saying "the straw that broke the camel's back").

COLLABORATING

Collaboration should be used when:

- the parties are willing to work out a solution together
- there is sufficient time to address the issues surrounding the dispute
- there is an ongoing relationship between the parties.

The collaborating style is often used during settlement discussions or at mediation. For example, by taking the time to discuss the issues, the parties may realize that there is a solution that would satisfy the interests of both sides.

As a legal professional, it is important to be aware of the style that the client has been using throughout the conflict and the type of response that it has triggered from the other party. As well, be mindful of the style that you are using with the opposing legal representative or party. If the matter is not progressing toward a resolution, it may be appropriate to consciously change the conflict management style that is being used in order to see if it makes a difference. For example, if the competing style seems to cause the other party to avoid discussions, perhaps the collaborating or compromising style will be more effective. Keeping a fluid style, as opposed to a single, rigid style, may help things move toward a settlement.

Suspension

suspension
the act of putting the emptation to fix, correct, and problem-solve on old in an effort to more osely examine the issue

The concept of **suspension** means to wait before responding or reacting to a conflict situation. It means putting aside the temptation to fix, correct, and problem-solve in order to more closely examine the issue. It is essentially a temporary form of avoidance with the full intention of addressing the conflict at a more appropriate time. Too often, we try to deal with an issue before we are prepared to effectively resolve it. The process of suspension allows each party to take a step back, check their emotions, and consider how to proceed.[18] By engaging in suspension, people are able to consider their thoughts and concerns before acting on them.

18 W Isaacs, *Dialogue and the Art of Thinking Together: A Pioneering Approach to Communicati... Life* (New York: Doubleday, 1999) at 134-58.

PRACTICE TIP

Determining Which Conflict Management Style to Use

It may be worth spending some time with your client to determine what is really important to them. Some questions for discussion with your client could include:

- Do you value the outcome or the relationship more?
- Is this a situation where it is important for you to win entirely, or would you be satisfied with a shared victory?
- What are some creative ways to resolve the issue?
- How much time and energy are you willing to devote to settling it?
- Are there common goals or interests between the parties?
- How have you dealt with conflict in the past with this person?

Asking these questions can help to assess whether it is appropriate to use one of the more cooperative approaches (e.g., accommodating or compromising), the aggressive style of competing, if there should be more time devoted to working through the issues by collaborating, or if the claim should be abandoned altogether (avoiding).

Minor sports often utilize a variation of suspension by implementing a "24-hour rule," which prohibits parents from raising an issue with the coach until the following day. This allows parents an opportunity to think through the situation and prepare for their discussion with the coach. A day later each side may have a better perspective of the issue and it allows emotions to cool down.

As a society, we have become accustomed to instantaneous communication. Coaches can reach their players at any time of the day or night. Similarly, parents and players have access to their coach on a constant and continual basis. The ability to communicate in real time through text messaging or email does not necessarily lead to the best possible outcome. For instance, in the heat of the moment, an inappropriate remark might be made to the coach. However, if the same person had taken the time to review and assess the situation and then respond the next day, there may have been enough time to de-escalate the situation or for it to be properly resolved.[19]

By suspending an immediate response, the parties can assess their own conflict management tendencies and consciously adopt a strategy that is most appropriate for the situation at hand. Further, what seemed like a major issue at the time, may seem much less important the next day when emotions have cooled down.

Perhaps other conflicts could be better handled by using an approach similar to the 24-hour rule and having the parties engage in the process of suspension. Even a short

cooling-off period has some advantages if it is not possible to wait the full 24 hours. Ury describes this as going to the balcony:

> When you find yourself facing a difficult negotiation, you need to step back, collect your wits, and see the situation objectively. Imagine you are negotiating on a stage and then imagine yourself climbing onto a balcony overlooking the stage. The "balcony" is a metaphor for a mental attitude of detachment. From the balcony you can calmly evaluate the conflict almost as if you were a third party. You can think constructively from both sides and look for a mutually satisfactory way to resolve the problem.[20]

While suspension (or use of the 24-hour rule) is helpful for short periods, it cannot be prolonged for an extended period of time. Continual use of suspension turns into avoidance and the use of the avoidance style can cause other issues (e.g., denying of the existence of a conflict, abandoning efforts to resolve the conflict, and preventing growth in the relationship).

PRACTICE TIP

Using Suspension with Clients

Discussing the circumstances surrounding a legal dispute can become highly emotional for some clients. A client who is angry or upset may say something they will later regret or make an unfavourable decision. There are times when it might be best to suspend the discussion. Know when to jump in to request the discussions be scheduled for another day or even break for a few minutes to meet with your client in private. This will help the client to remove themself from the situation and will provide an opportunity for them to regain control over their emotions. For some clients, a short meeting with their legal representative in private may help. Others may need to go outside for some fresh air or reschedule for another date.

CASE FOR DISCUSSION: SMOOTH MOVES PAVING

Santino hired a local paving company, Smooth Moves Paving, to resurface his driveway. The work appeared to be completed to his satisfaction and he paid the agreed-upon amount of $4,400 in cash. Less than six months later, he noticed that his driveway was starting to crumble in some places and that it was buckling in other spots. This was inconvenient and dangerous for Santino and his family: If he parked his truck on the driveway, the weight of the truck caused more damage; if his kids tried to play or ride their bikes on the driveway, they had to continually avoid the hazards of an uneven surface. Upon inspection, Santino determined that the company had used only 1 1/4 inches of asphalt instead of the 3-inch thickness that they had discussed.

When Santino contacted Andre, the owner of Smooth Moves Paving, he asked if Andre would be willing to inspect the condition of the driveway and to ensure that the work was done properly. Andre denied any wrongdoing by Smooth Moves Paving and was so angry at the request that he refused to discuss it any further with Santino and slammed down the phone.

Santino was afraid that he had been taken advantage of and that he would not be able to get the driveway fixed. A few days after the phone call, Santino noticed a crew from Smooth Moves Paving working at another house on his street. Santino went to take photos of the work they were doing and tried to discuss his situation with one of the workers, who then called Andre over. It was not long before the conflict escalated and both parties were yelling. Santino insisted that he wanted his money back. Andre threatened to call the police to have Santino charged with trespassing.

After the confrontation, Andre felt bad about the way that he reacted. Business had been slow this year, and he was feeling stressed. Andre had been forced to lay off a couple of his workers, including the crew that had done Santino's driveway. This was not the first time a customer had complained about this particular crew, but Andre needed to look into it before admitting any liability to Santino. The last thing he needed was to be sued. He was concerned that these complaints would damage his company's reputation.

Santino had decided to sue the company in Small Claims Court, but upon discussing the matter with a paralegal, he realized that his chances of success were not very strong; since it had been a "cash deal," he did not have any written proof of their original agreement. The paralegal recommended using a mediator to facilitate a discussion about how this matter could be settled. At mediation, Santino and Andre agreed to have another paving company provide a quotation to fix the work. Andre would then have the option of refunding enough money for the work to be done by the other company or, if his work situation permitted, personally working with one of his crews to complete the work to Santino's satisfaction within the industry standards.

Case Analysis

The case presented in the Case for Discussion box describes a contractual relationship between a homeowner, Santino, and the owner of Smooth Moves Paving, Andre. The details of the contract would have helped to determine who has the stronger legal position, but since it was a verbal contract and not a written contract, it would have been difficult to enforce in court. The paralegal was wise to suggest a form of ADR to resolve this issue.

Using the definition of conflict that appears earlier in this chapter ("a state of disharmony resulting from opposing views or incompatible positions and interests"), it is clear that Santino and Andre were in conflict. They had opposing positions and interests, and the angry exchange between the two parties could certainly be described as a state of disharmony. In terms of positions, the two parties were in disagreement: Santino believed that the work was not done properly, and Andre claimed that it was. Santino's interests were to ensure that he was not being taken advantage of and to have use of his driveway for his vehicle and for his children. Andre's interests were

20 W Ury, *Getting Past No: Negotiating Our Way from Confrontation to Cooperation* (New York: Bantam, 1993) at 37-38.

related to his company's reputation and the fact that it had not been a profitable year for his company.

Santino was aware of the problems with the driveway before he raised the issue with Andre. Therefore, Santino had more time to think about the situation than Andre. Santino was able to suspend, consider the issue, and think about how he would like to address it with Andre, thus controlling the way that he initially responded. But Andre was caught by a surprise phone call and responded instinctively with an outright denial of responsibility.

This case presents several different conflict management styles. Santino's initial phone call was intended to be compromising and accommodating by suggesting that Smooth Moves Paving could fix the problem. However, when Andre responded in a competing yet avoiding manner, the conflict escalated. This brought Santino into a more strategic response, and he also became competitive, wanting to use a rights-based approach to commence a lawsuit against Andre and his company. In this case, utilizing an emotionally charged aggressive style did not help the matter move towards settlement. Shifting to a more cooperative approach helped to achieve a resolution that satisfied the needs of both parties. It demonstrates that a person's dominant conflict management style can be consciously changed to adapt to the circumstances.

Based on the resolution to this matter, it appears that the parties have worked together and collaborated at mediation to determine first how to quantify the cost of repairing the driveway. They also appear to have compromised by allowing Andre the opportunity to choose if he would like to do the work or to refer it to another company.

This case also introduces a couple of conflict resolution techniques that will be discussed later in the book. Specifically, the technique of using external *objective criteria* to access options for fairness. In the scenario, the parties agree to rely on an external quotation from another paving company and to ensure the work is completed to industry standards. The quotation and the application of industry standards are both examples of objective criteria that are external to the actual mediation and beyond the influence of either of the parties. Further, the technique of *developing more than one option* is introduced. By generating more than one option (e.g., agreeing to a refund or having Andre complete the work himself), the parties brained-storm ideas, collaborated and were able to achieve a win–win resolution.

Resolving Conflict Outside of the Courtroom

Parties generally want to be part of the decision-making process for disputes that impact their lives. When conflict is resolved outside of the courtroom (i.e., using ADR), there tends to be increased involvement from the parties, which can lead to more collaborative and productive outcomes. The parties can structure the resolution to meet their needs and can incorporate creative ways to resolve the matter.

A resolution outside of a courtroom setting is preferable for people who want to be involved in the decision-making process for matters that impact their lives, rather than being passive recipients of a judge's order. A comparison of ADR and trial outcomes found that ADR can lead to many positive outcomes, including:

- participants are more likely to completely resolve their issues
- immediate positive shifts in party attitudes toward each other
- greater acknowledgement of personal responsibility
- improved relationships and attitudes towards the other party
- satisfaction with the process and final outcomes.[21]

As an additional incentive, agreeing on a resolution outside of court will often result in a higher level of compliance with the agreement. McEwen and Maiman found that when parties are involved in developing the solution, they feel a greater personal sense of responsibility and are therefore more likely to comply.[22]

A review of eight studies of small claims court mediation programs determined that the rate of compliance with a mediated solution was between 62 and 90 percent.[23] As well, another study conducted by a California-based dispute resolution service (SEEDS Conflict Resolution Centre) found that 86 percent of the parties who had achieved a full resolution in mediation had also received payment of their settlement funds.[24] Further, as summarized in Table 2.1, the McEwen and Maiman study of small claims court cases found a much higher compliance rate with mediated cases as compared with adjudicated cases.[25]

TABLE 2.1 Compliance with the Resolution

Compliance	Mediated Cases	Adjudicated Cases
Full payment	70.6%	33.8%
Partial payment	16.5%	21.2%
Defaulted payment	12.8%	45.1%

CA McEwen & RJ Maiman, "Small Claims Mediation in Maine. An Empirical Assessment" (1981) 33 Me L Rev 237.

ADR has gained popularity by providing alternate forums for settlement discussions (e.g., informal negotiations can take place in law offices or coffee shops; meeting rooms can be the setting for mediation; and hotel conference rooms are often used for arbitration) and the opportunity to resolve matters without going to court.

21 L Charkoudian et al, "What Difference Does ADR Make? Comparison of ADR and Trial Outcomes in Small Claims Court" (2017) 35 Conflict Resolution Quarterly 7 at 45.

22 CA McEwen & RJ Maiman, "Small Claims Mediation in Maine: An Empirical Assessment" (1981) 33 Me L Rev 237.

23 RL Wissler, "The Effectiveness of Court-connected Dispute Resolution in Civil Cases" (2004) 22(1-2) Conflict Resolution Quarterly 55 at 59.

24 M Robertson, "Compliance Success with Mediated Settlements in Small Claims" (11 June 2015), online: Mediate Canada <https://www.mediate.com/articles/RobertsonM1.cfm#comments>.

25 McEwen & Maiman, *supra* note 22.

RECURRING CASE STUDY

Conflict Resolution Styles

Mary quite likes their tenant, Angela. They would chat from time to time in the front yard. Mary learned that Angela is putting herself through college—working a part-time job while attending school full time and competing in figure skating competitions. Two months ago, while Leo was away, she invited Angela upstairs for dinner and the two had a nice chat. During this dinner, Angela mentioned a couple of small improvements that were needed for the basement apartment and Mary had them resolved right away.

Last month while Mary and Leo were away for the long weekend, Angela sent Mary and urgent text message saying that there was a flood in the basement. Mary assured Angela that they would look into it when they returned home two days later. This was not the first time that Mary and Leo had problems with the pipes in the basement—they had significant damage before they renovated it into a basement apartment.

When they returned home, Mary was surprised to find a letter from Angela in their mailbox. Angela's letter listed the items that were damaged and she asked for compensation for the damages. Mary would have tried to work something out with Angela on her own, but Leo insisted on getting involved when he heard that Angela was asking for $1,000.

Leo never really wanted to have a tenant, but he had reluctantly agreed because Mary is uncomfortable being home alone when he travels for work. Leo stayed out of the tenant selection process and had intended to let Mary handle everything related to the tenant she selected—Angela. However, he felt that he had to get involved when he found out that Angela was trying to extort $1000 from his wife! He immediately banged on the basement door and stormed downstairs to confront her. Although he had tried to remain calm, his temper got the best of him. He walked right up to Angela, waved his fist in her face and yelled at her. Leo blamed her for the leak and told her that she was not getting one penny from them. He had threatened to call the police to have her removed from the premises, but he never made the phone call to the police. During the confrontation, Leo exclaimed that "all students are irresponsible and greedy" and accused Angela of "trying to steal money from his wife." He did not give her the chance to get a word in edgewise before he rushed back upstairs. He later regretted his actions, apologized for the outburst, and offered her $60 for new skates.

Prior to this incident, Angela had been happy with her living arrangement and enjoyed interacting with Mary. She did not really know Leo because he was away a lot for work. Angela was very worried about her finances since she was putting herself through school. Leasing this basement apartment had been perfect for her because it was walking distance to college and the price was right. Angela had previously noticed a musty smell in the basement, but did not think too much of it. She'd had a busy couple of weeks with midterms and was anxious to get back to skating. When she was getting ready to leave for practice, she discovered that all of her belongings in the hall closet, including her figure skates, were completely soaked with water. Of course, she discovered the flood on a long weekend while both Mary and Leo were away.

When she texted Mary with the news, Mary assured her that they would take care of everything in a couple of days. Angela replied to Mary's message with "OH GREAT." In the meantime, Angela looked into the replacement cost for her damaged items. She does not have the money to replace her belongings herself, but one of her friends told her that the landlord is responsible for anything that is damaged. Angela made a list of the items and left the list for Mary hoping that she would agree to split the cost with her. However, as soon as they returned home, Leo knocked loudly on the door and rushed into her apartment while screaming at the top of his lungs. He would not let her explain anything. He just did not seem to understand how important the figure skates are to her. Angela does not understand why Leo and Mary would not compensate her—they seem to have a lot of money because Leo is always travelling around the world.

Discussion of Scenario

- *Accommodating Style*: Mary's conflict management style can be seen as accommodating because she quickly made the improvements that Angela had mentioned and she assured Angela that she would take care of everything. The accommodating approach works well in this situation because of the on-going nature of the relationship between the parties.
- *Competitive Style*: In the scenario, Leo's conflict management style first was presented as avoiding (e.g., he did not assist with tenant selection and wanted to let Mary handle everything). Later in the scenario, he demonstrated a very competitive style when he aggressively confronted Angela about the amount of the damage.
- Compromising Style: Angela displayed a compromising style because she was willing to split the cost of the damages with Mary.
- Use of Suspension: Perhaps Leo should have suspended his reaction and waited 24 hours instead of confronting Angela with an impulsive outburst.

CHAPTER SUMMARY

Conflict is a state of disharmony resulting from opposing views or incompatible positions and interests. Conflict can occur at all stages of life whenever someone or something stands in the way of getting what you want. While conflict is typically viewed negatively, theorists have suggested that safely managed conflict can be a force for bringing about positive change. Legal professionals are often retained to become involved in managing conflict when parties have exhausted their own strategies for dealing with the issues that triggered the conflict.

Recognizing that each person has a dominant style for managing conflict will help legal professionals to work with their clients to resolve conflicts. The Thomas-Kilmann Conflict Mode Instrument (TKI) identifies five conflict management styles to consider when dealing with conflicts: competing, compromising, accommodating, avoiding and collaborating. It is possible to change the way of responding to conflict by recognizing when it is appropriate to use a particular conflict management style: first suspend initial response to the conflict, then take the time to assess the situation, and finally make a conscious choice about which style would be most effective.

There are many benefits associated with resolving conflict outside of the courtroom. When parties are involved in the resolution, there tends to be more collaborative and productive outcomes. As well, studies have demonstrated that ADR processes can lead to greater compliance and party satisfaction.

KEY TERMS

accommodating, **44**
avoiding, **44**
collaborating, **44**
competing, **44**
compromising, **44**
conflict, **41**
dominant style, **44**
fiduciary duty , **43**
suspension, **50**
Thomas-Kilmann Conflict Mode Instrument (TKI), **44**

Theoretical Approaches to Understanding Conflict

3

Learning Outcomes

After reading this chapter, you will be able to:

- Analyze conflict situations using various theoretical approaches.
- Apply conflict theory to personal and professional conflicts.
- Differentiate between various theories for understanding conflict.
- Appreciate how theoretical perspectives can help a legal professional to understand how a client deals with conflict.
- Apply the concepts from this chapter to a recurring conflict case scenario.

Introduction

There are many different ways to analyze and understand conflict. People who are fully immersed in a dispute often have difficulty making sense of their own conflict situation. The application of theoretical perspectives is intended to provide a framework for legal professionals to better understand their clients' conflicts. Selected theories will be discussed in the pages to follow. Throughout this discussion, the conflict theories will be applied to a landlord–tenant example in which the tenant is late in paying rent to the landlord.

Attribution Theory

attribution theory a psychological theory based on the concept that people try to make sense of the world around them by attributing meaning to the behaviours of others

internal attribution when behaviour can be explained by a personal characteristic or dispositional factor

dispositional factor individual characteristics that influence a person's behaviour and actions

external attribution when an inference about behaviour is based on a situational factor that is outside of the party's control

Attribution theory is a psychological theory based on the concept that people continually try to make sense of the world around them. In doing so, they assign, or attribute, meaning to their own behaviour and the behaviour of others. Making inferences from behaviour is a basic aspect of human interaction.

Attribution theory is often applied to conflict situations because of the assumptions and inferences that we tend to make about another person's motives and behaviour in a conflict. In doing so, we often attribute blame for the conflict to the other party. In a landlord–tenant dispute, for example, the landlord may try to make sense of the tenant's late rent payment but would be unlikely to see their own contributions to the situation, even if they had been unavailable to receive payment or unwilling to discuss any rent-related issues. Attribution theory further suggests that behaviours can be classified as being caused by internal and/or external factors.

Internal attribution occurs when we believe that someone's behaviour can be explained by a personal characteristic, **dispositional factor**, or motive. In the example of the tenant's late rent payment, the landlord might attribute it to the tenant's laziness or irresponsible nature. Alternatively, the landlord could speculate on the tenant's motive—possibly to anger the landlord enough to get out of the lease.

External attribution occurs when we make an inference about someone else's behaviour based on a situational factor that is outside of that person's control. For example, a late rent payment could be attributed to an external cause such as a snowstorm or illness.

According to McCorkle and Reese, conflict is driven by the attributions we assign to another party and the way we interpret those attributions. They believe that attribution theory can explain the escalation of conflict. Specifically, when we attribute a motive to someone else, it also influences the way we behave and the responses we receive. If we assign the internal attribution of untrustworthiness to a particular person, it would cause us to act toward that person with apprehension or suspicion. This, in turn, may cause that person to feel resentful and misjudged, which can cause them to respond to us in a defensive manner, thus escalating the conflict.[1]

In our example, if the landlord feels that the tenant is irresponsible (internal attribute), the landlord may also assume that the tenant is the cause of damage to the apartment or a mess in the hallway and start judging the tenant's actions more aggressively or suspiciously. The tenant may then act in response to the landlord's assumptions.

1 S McCorkle & M Reese, *Personal Conflict Management: Theory and Practice* (Boston: Pearson Education, 2010).

Of course, with attribution theory, the inferences are really assumptions which can be easily mistaken or made without merit. **Fundamental attribution error** refers to the tendency to attribute another party's wrongful behaviour to internal characteristics while overlooking the external factors that could have contributed to the situation. It occurs when one party acts on their assumptions by assigning blame to another's personal traits without verifying their assumptions. Interestingly, we often commit this error when trying to understand another person's behaviour, but often attribute our own wrongful behaviour to external factors. For example, we may interpret another person's behaviour as intentional but our own behaviour as justifiable due to the situation. In the landlord–tenant example, the landlord might assume that the tenant purposely dropped off the rent cheque late and then wrongfully assign a number of unfavourable internal attributes to the tenant. In reality, the tenant may have tried to contact the landlord on several occasions, but unknown to the landlord, his voicemail was not set up properly This fundamental attribution error may cause the landlord to act distrustfully and punitively toward the tenant, thus escalating the conflict. If the conflict is not resolved at this stage, the tenant may then start to avoid the landlord in the future. In this example, the conflict has not been effectively managed and has been based on inaccurate assumptions and a series of wrongful reactions to those assumptions.

fundamental attribution error the tendency to attribute another party's behaviour to internal characteristics but our own behaviour to external factors

Another type of attribution error is **self-serving bias**, which occurs when we assign internal attributions to conflict situations where we are successful, but external attributions to situations where we are unsuccessful. For example, the landlord might boast of a wait list of potential tenants and assign internal attributions to himself (e.g., "tenants want to live here because I am a kind, reasonable, supportive landlord"). By contrast, if tenants complain about a significant increase in rent, the landlord likely would not assign internal attributions to themself in this situation (e.g., "tenants think I am greedy or unreasonable"), but instead may assign fault to external attributions, such as poor economic conditions or an increase in the cost of living.

self-serving bias when internal attributions are assigned to situations where we are successful, but external factors to situations where we are unsuccessful

Attribution theory can be a useful tool to analyze conflict situations, as long as assumptions are confirmed. Further, we need to be aware of our own tendencies to apply self-serving bias and the possibility of committing a fundamental attribution error.

PRACTICE TIP

Using Attribution Theory to Understand Your Client's Perspective

It can be helpful for legal professionals to apply attribution theory in order to better understand disputes. It should be recognized that clients who are dealing with conflict will often present self-serving bias or commit a fundamental attribution error to justify their own behaviour or make assumptions about the opposing party. In preparing such a case, remember to conduct research, confirm all assumptions, and apply objective criteria to determine industry standards and acceptable behaviour. As a legal professional, exercise caution when dealing with a client who never seems to accept any responsibility for anything that has gone wrong.

For example, a client who retains a representative to commence a small claims action against her hairstylist may assume that her hair colour turned green because the stylist was incompetent or made a mistake in the application of the dye (fundamental attribution error), when the problem actually stemmed from an issue with the dye manufacturer. The client may also try to deflect any responsibility and justify her own decision to go to that stylist in the first place by absolving herself of responsibility and saying it was another party's fault for recommending that stylist (self-serving bias). By contrast, if the client is pleased with the stylist's work, she may try to take credit for her ability to source out the best stylists in town.

Human Needs Theory

human needs theory a theory that suggests conflict is caused by a party's inability to meet his or her fundamental needs

Human needs theory provides insight into possible sources of conflict. The theory suggests that conflict can be caused by an inability to meet fundamental needs. Specifically, everyone has certain essential basic human needs in their lives:

- safety and security,
- belongingness and love,
- self-esteem,
- personal fulfillment,
- identity,
- cultural security,
- **distributive justice**, and
- participation in society.[2]

distributive justice fair allocation of resources among all members of a community

Conflict is triggered when a person cannot see any options to meet these needs. The inability to meet basic needs can prompt an aggressive reaction or an act of violence, which will result in further conflict escalation. For example, a landlord and tenant dispute could be rooted in a need for safety and security or distributive justice. If the tenant is unable to pay rent, they may not able to meet their need for security. The landlord may feel that the tenant's actions are a threat to the landlord's need for distributive justice, or to the landlord's need for their identity to be respected as an authority figure.

A deep analysis of conflict within a human needs framework can reveal common goals, including goals of human development and autonomy.[3] Recognizing our own unmet needs and the unmet needs of another party can lead to other ways to meet these needs without engaging in conflict. We may be able to redefine the conflict and engage in a collaborative, problem-solving process instead of continuing with the conflict. For instance, if the landlord was to assure the tenant that a partial payment of rent would not jeopardize the living arrangement, then the tenant would have a greater sense of security. If the tenant were then to express appreciation and recognition to the landlord, it would address the landlord's needs for identity and distributive justice.

In trying to understand a client's position, a legal professional should consider which of the client's needs may have been jeopardized. By identifying the sources of conflict through human needs theory, the parties and their representatives can achieve a better understanding of the underlying interests, which may be helpful in generating possible options and moving toward resolution.

Systems Theory

Systems theory is a theory that suggests that a conflict cannot be viewed in isolation. Systems theory embraces the fundamental concepts associated with the **domino effect** (i.e., one domino falls knocking down a series of other dominos). Actions or events cannot be viewed in isolation because they impact other actions and events. The domino effect is applicable to conflict situations because a change in one behaviour causes a chain reaction and results in a change to other related behaviours.

Systems theory expands upon the domino effect by recognizing that events do not only occur in a linear way (i.e., there is a broader impact than just the effect on the next domino in the sequence). Systems theory asserts that a conflict should be examined in relation to the entire system in which it takes place. A **system** refers to any social unit, including a family, a company, or any other kind of social organization.[4] Heft defines systems theory as follows:

> Systems theory is a set of principles applying to complex, interacting wholes as a way to understand them. These principles are a tool to help us understand not just how things happen or are related in a linear way, but instead to conceptualize how processes, events, and things are *interrelated*, from cell to universe to time—to everything else. That is a difficult idea for our linear minds to grasp. Systems theory is an attempt to grasp the ungraspable—to understand reality in a larger way than just what we can see and measure.[5]

systems theory a theory that suggests conflict cannot be viewed in isolation, but that it should be examined in relation to the entire system in which it takes place

domino effect making a change in one behaviour causes a chain reaction in other behaviours

system any social unit, including a family, a company, or any other kind of social organization

2 S Marker, "Unmet Human Needs" in G Burgess & H Burgess, eds, *Beyond Intractability* (Boulder: Conflict Information Consortium, University of Colorado, 2003), online: <http://www.beyondintractability.org/essay/human-needs>.

3 JW Burton, "Peace Begins at Home: International Conflict—A Domestic Responsibility" (2001) 6.1 Int J Peace Studies 3.

4 NS Gorvein, "'System in Conflict': Analysis of the Conflict Theory Within a System" (2009) 0:1 J Conflictology at 10

5 L Heft, "The Mouse and the Earthquake: An Introduction to Systems Theory" (2006) 17:8 Systems Thinker 2 at 3.

In order to effectively understand a conflict, there is a need to examine all interactions that take place within a specific system because all the relationships within that system affect everything else within the system. As explained by Gorvein:

> [C]onflicts occur within a system made up of actors that play within a specific scene. The system we talk about is characterized by its circularity. A system is circular when one of its elements is affected and it has consequences on the rest of the elements comprising it and on the running or dynamics typical from that system.[6]

According to systems theory, conflict analysis cannot just look at one side of the dispute or at one moment in time. Instead, it is important to examine the interaction over time and in the relative context.[7] In our landlord–tenant example, instead of simply examining the one specific instance when the tenant did not pay rent, systems theory would consider a number of other factors, including the past relationship between the tenant and the landlord, the agreement they entered into for payment of rent, the general norms within the building for payment of rent, and the landlord's relationships with other tenants. All of these factors can have an impact on why the rent was not paid on time. Only by looking at the entire system of that particular social organization can we understand the specific conflict between the landlord and tenant.

Systems theory indicates that if one part of a system is altered, it causes a change in other parts of the system. Corresponding systems are not changed in a linear manner, but rather encompassed as a whole—all systems are thus interrelated and interdependent on one another.[8] For example, the landlord's argument with one tenant can have an impact on how other tenants feel about the landlord and how those tenants choose to react.

Systems theory can be helpful in trying to understand the root causes of a conflict, but it involves a complex analysis of the interrelationship of all parties and extended parties. Utilizing systems theory involves investing a significant amount of time to explore the history, as well as the status quo, of the present situation.

PRACTICE TIP

Using Systems Theory to Understand the Scope of a Conflict

Systems theory can be applied when trying to examine everything that may have had an impact on a particular conflict. This may help to understand a client's possible exposure and identify any other parties who should be named in a lawsuit or who could be summoned as a witness.

Consider the example of a client who retains a legal representative to sue a paving company for damage to the paint on her car when the company's truck spilled part of its load on the highway. Systems theory would consider the interrelationship of a number of factors that could have contributed to the incident, including the condition of the highway and who is responsible for monitoring its condition, the posted speed limit and why it was set at that rate, the load restrictions and how they were determined, other vehicles on the road and how they interacted with the truck, weather conditions and if weather alerts or special weather statements had been issued, the client's rate of speed, the type of paint used on the client's car, and so on. Applying systems theory would involve examining more than simply whether the damage was caused by the paving company. While all of these factors may not be relevant if the matter proceeds to court, they are useful to help achieve a full understanding of the issue.

6 *Supra* note 4 at 12.

7 McCorkle & Reese, *supra* note 1 at 22.

8 Gorvein, *supra* note 4.

Circle of Conflict

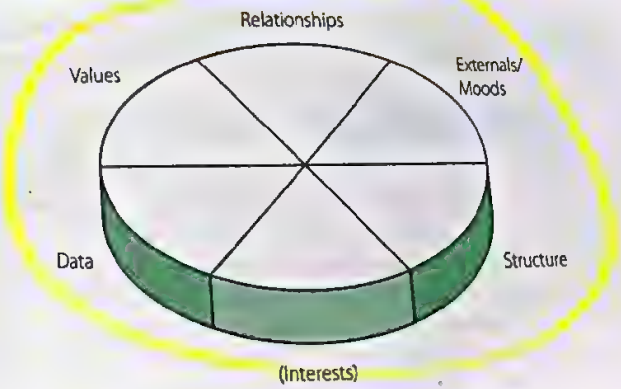
The **circle of conflict** is a model that offers a way to diagnose a conflict and identify the source of a conflict by examining six primary causes of conflict (see Figure 3.1):[9]

1. data
2. values
3. relationships
4. externals/moods
5. structure
6. interests

circle of conflict a way to diagnose a conflict by examining six primary causes of conflict: data, values, experience/relationship, externals/moods, structure, and interests

By categorizing the underlying causes of the conflict for each party, it becomes easier to understand the factors that create and fuel the conflict.

FIGURE 3.1 Circle of Conflict: Causes of Conflict



GT Furlong, *The Conflict Resolution Toolbox* (Mississauga, Ont: John Wiley & Sons Canada, 2020).

9 The circle of conflict was originally developed by Christopher Moore in *The Mediation Process*, 3rd ed (San Francisco: Jossey-Bass, 2003), but has been since adapted by Gary T Furlong in *The Conflict Resolution Toolbox* (Mississauga, Ont: John Wiley & Sons Canada, 2020).

One of the primary causes of conflict is **data**. When data or other information is incomplete or incorrect, the negative assumptions by a party tend to escalate and lead to greater conflict. In addition, it is important for parties to realize that "facts" can be misinterpreted. As a result, data can be a significant driver of conflict as parties make negative assumptions based on wrong or misunderstood information.[10] For example, an error or oversight on the lease agreement could lead to a misunderstanding between the landlord and tenant.

Values are also an underlying cause of conflict. According to Furlong, value conflict occurs as a result of the clash of parties' differing values and beliefs, including terminal or life-defining values (e.g., religious beliefs, morals, and ethical views) and simpler day-to-day values (e.g., politeness). These values may either cause the conflict or contribute to it.[11] In the landlord–tenant example, the tenant could hold a value that religious holidays are sacred and it would be inappropriate to drop off a cheque on such a day. As a result, the tenant may decide to make the payment a day past the due date. By contrast, the landlord may place more weight on the value that it is morally wrong to not honour your debts in a timely manner.

Another cause of conflict can result from specific negative past experiences or **relationships** that lead and drive the current conflict. For example, any prior disagreements between the landlord and tenant could have an impact on the willingness of the tenant to deliver the rent cheque on time or to discuss the possibility of an extension for payment. Additionally, relationship conflict can be based upon stereotypes and assumptions (e.g., the landlord believes that all tenants in their twenties will behave in a certain way).

External factors that are unrelated to the substance of the dispute can also be significant contributors to a particular conflict. Essentially, any factor not directly involved in the parties' dispute can still be a contributor to the conflict. These factors, while unrelated, can intensify the conflict, causing a rise in tension, anxiety, and pressure on the parties. In the landlord–tenant example, vacant apartments within the building could lead to stress about a need for more revenue, causing the landlord to overreact when a tenant is late in making a rent payment.

Structural issues can contribute to a conflict when there is competition for limited resources, a lack of authority to deal with issues, or differences with priorities. In the landlord and tenant example, the structural dynamics of the conflict could be related to the lease agreement between the landlord and tenant, as both parties must adhere to certain rights and responsibilities (e.g., the tenant's right to privacy and the landlord's right to receive rent in accordance with the lease agreement). In addition, the structural issue of limited resources has further fuelled the conflict: the landlord's desire to be paid rent without the hassle of finding a new tenant.

Interests can be described as what has caused a party to come to a particular position—that is, why a party wants what they want. Understanding interests will provide insight on the needs, wants, fears, and hopes for the parties. It will also present opportunities to develop options that could meet the interests of all parties. In our example, the landlord and tenant could have a common interest in ensuring the proper upkeep of the apartment, but both have different positions in terms of how this can be accomplished; for example, the tenant may take the position of withholding rent until the work is done, but the landlord may take the position of needing the rent money to pay for repairs.

Analysis conducted with the circle of conflict can help gather information that can lead to strategic directions for resolution.

10 Furlong, *supra* note 9 at 70.

11 *Ibid* at 69.

"THERE IS NO MAGIC FORMULA THAT RESOLVES ALL DISPUTES"

It is important for legal professionals to become familiar with a range of ways to approach conflict because, as Gary Furlong notes in his book *The Conflict Resolution Toolbox*:

> There is no magic formula that resolves all disputes. Because conflict situations can be so diverse, and because models are not exclusive representations of "truth," we are not looking for a single model that will make sense of every conflict in the world. Rather, we need to be comfortable with a wide range of models that will help us in diagnosing different problems, in vastly different circumstances, with different people. ...
>
> Diagnosis is about framing the conflict in a way that has coherence and makes sense. The effective practitioner needs a wide range of diagnostic models and frameworks that help organize and make sense of a wide range of situations.

As described by Bernard Mayer [in his book *The Dynamics of Conflict Resolution* (San Francisco: Jossey-Bass, 2000) at 4], these models are essential to the practitioner:

> A framework for understanding conflict is an organizing lens that brings a conflict into better focus. There are many different lenses we can use to look at conflict, and each of us will find some more amenable to our own way of thinking than others. ... We need frameworks that expand our thinking, that challenge our assumptions, and that are practical and readily usable.

Mayer's "lens" analogy is useful. For example, conflict can be viewed through a communications lens, a type of conflict lens, an "interests" lens, a personality lens, a structural lens, a cultural lens, a dynamics of conflict lens, and more. This means that an effective practitioner should have a constellation of diagnostic models to help frame and understand different situations; as experience grows, the practitioner will become more skilled at choosing the one(s) that will help create effective interventions.

Regardless of the type of model or map, good models do have some characteristics in common. Each model needs to meet the practitioner's test: "Does applying this model help me diagnose the problem as well as help me choose what I do next, in real time as I work with the conflict?"

Source: Gary T Furlong, *The Conflict Resolution Toolbox* (Mississauga, Ont: John Wiley & Sons Canada, 2020) at 9-10.

Perspectivism

perspectivism the view that there is no one correct theory or viewpoint; instead, there are many different perspectives from which to view a conflict

The theories discussed in this chapter have provided some insight into different theoretical interpretations for understanding conflict. To make sense of the relationship between these theories, the concept of **perspectivism** can be applied.

Perspectivism suggests that there is no one correct theory or viewpoint; instead, there are many different perspectives from which to view a conflict. People will see things differently when in a conflict, and this will affect the way that people interpret and understand the situation. Different angles and considerations provide varying ways to view a phenomenon. Perspectivism suggests that there is not a best perspective, but rather a wide variety of choices as to which perspective to select. The perspective that we choose will have an influence on the way we see things, the questions we ask and the information that we ultimately collect.[12]

punctuating the conflict interpretation of the conflict is shaped by the lens chosen to view it

Perspectives can be explained as the lenses through which we view conflict. Our interpretation of the conflict is shaped by the lens that we choose. This approach can be described as **punctuating the conflict**. The act of selecting which information to analyze, and how to apply it to the conflict analysis, punctuates that conflict and helps to make sense of it. As demonstrated by Figure 3.2, two people can see the same situation differently depending on their position and what they choose to focus on. Perspectivism suggests that there can be different interpretations of the same information depending on how the conflict was punctuated.

FIGURE 3.2 Perspectivism: Different Interpretations of the Same Information

12 JP Folger, MS Poole & RK Stutman, *Working Through Conflict: Strategies for Relationships, Groups, and Organizations* (Toronto: Pearson Education, 2005).

The landlord and tenant dispute will seem different when examined from the perspective of either the landlord or the tenant. Furthermore, there may be a different understanding if it is viewed from a bank's perspective or from the perspective of a potential tenant who is on a wait list for an apartment in the building. Our perspectives shape our interpretations and understanding.

Perspectivism proposes that conflict is best understood if viewed from different angles and by applying a range of different theories to arrive at a more complete understanding.

PRACTICE TIP

Using Perspectivism to Assess a Client's Conflict

Legal professionals should use perspectivism to assess a client's legal matter from a variety of different angles. In doing so, they will be able to help the client to better understand their situation and can present a range of options in terms of how to proceed. This will help to ensure that the client has all of the necessary information to make an informed choice about their options.

RECURRING CASE STUDY

Application of Conflict Theories

To briefly recap what has taken place so far in the scenario, Angela suffered $1,000 worth of water damage to her personal belongings as a result of a problem with the pipes in her basement apartment. She presented a summary of the damages to her landlords, Mary and Leo, but they are only willing to pay $60.

Two different conflict theories will be applied to the scenario in order to make sense of what has taken place so far. Please review the facts of the Recurring Case Study, as set out in Chapters 1 and 2.

Discussion of Scenario

- *Attribution Theory*: Angela assumed that her landlords have a lot of money because Leo is always travelling. However, his travel is work-related and not an indicator of their financial situation. Further, Leo assumed that Angela is greedy because she asked for full compensation, but did not recognize that $1,000 is a lot of money for a student who is trying to put herself through school.
- *Circle of Conflict*: Applying the circle of conflict can help to diagnose this conflict situation:
  - Data: It is important to investigate whether there is any inaccurate or incomplete information. Mary and Leo have not revealed that they had a problem with this pipe in the past. Angela did not indicate that there was a musty smell in the apartment. This information might be needed to understand the origin of the issue and to determine who should take responsibility.
  - Values: It appears that Angela has attached sentimental value to her figure skates, which Leo and Mary do not seem to recognize. The parties are placing a different value on the skates.
  - Relationships: Although Angela has a good relationship with Mary, she hardly knows Leo and he seems to be the person who has now taken charge. As well, Angela seems to have had a bad experience with her previous landlord, which could be fueling the way that she is dealing with this situation.
  - Externals/Moods: Both parties seem to be dealing with financial issues to some degree. Angela is working hard to put herself through school. Leo and Mary had to rent out the basement apartment because they need extra income.
  - Structure: Since Angela does not know anything about law, this can be seen as the structural issue of limited resources (e.g., lack of knowledge).
  - Interests: Both parties seem to have a common underlying interest of maintaining the landlord–tenant relationship, but additional interests for each side should be further investigated.

CHAPTER SUMMARY

There are several important theoretical perspectives that can help us analyze and understand conflict: attribution theory, human needs theory, systems theory, circle of conflict, and perspectivism. Attribution theory posits that people make sense of conflict by attributing meaning to the behaviours of others, and in doing so, they often misjudge the motives behind those behaviours. Human needs theory indicates that conflict is caused by a party's inability to meet their fundamental needs. A more broad-based theoretical approach to conflict analysis is systems theory, which explains conflict by examining it in relation to the entire system in which the conflict takes place. The circle of conflict is a way to diagnose a conflict by examining six primary causes of conflict: data, values, relationships, externals/moods, structure, and interests. Perspectivism suggests that there is no one correct theory or viewpoint; instead, there are many different perspectives from which to view a conflict.

Legal professionals who seek to best represent their clients, should possess the necessary knowledge and understanding of the legal dispute, including how their client tends to respond to conflict situations. Various theoretical approaches may be useful in trying to achieve such an understanding.

KEY TERMS

attribution theory, **64**
circle of conflict, **69**
dispositional factor, **64**
distributive justice, **66**
domino effect, **67**
external attribution, **64**
fundamental attribution error, **65**
human needs theory, **66**
internal attribution, **64**
perspectivism, **72**
punctuating the conflict, **72**
self-serving bias, **65**
system, **67**
systems theory, **67**

REVIEW QUESTIONS

1. Carrie was involved in a multi-vehicle, chain-reaction collision in which she rear-ended another vehicle on the highway. She told the police officer at the scene that it was not her fault; the accident was caused because the other vehicle stopped too quickly and because the sun was in her eyes. According to attribution theory, what error has Carrie committed?
   a. Fundamental attribution error.
   b. Self-serving bias.
   c. Internal attribution.
   d. Human needs error.
2. Related to the same collision, Carrie told the police officer at the scene that the driver who rear-ended her was not paying attention and seemed to be an inexperienced driver. According to attribution theory, what error has Carrie committed?
   a. Fundamental attribution error.
   b. Self-serving bias.
   c. External attribution.
   d. Systems error.
3. Which theoretical approach suggests that there is no one correct theory or viewpoint, but instead there are many different perspectives from which to view a conflict?
   a. Human needs theory.
   b. Systems theory.
   c. Attribution theory.
   d. Perspectivism.
4. Which theoretical approach indicates that conflict analysis cannot just look at one side of the dispute or at one moment in time?
   a. Human needs theory.
   b. Systems theory.
   c. Attribution theory.
   d. Perspectivism.
5. What does the phrase "punctuating the conflict" mean?
   a. The interpretation of the conflict is shaped by the lens chosen to view it.
   b. The conflict would be more effectively addressed through written communication than verbal communication.
   c. The conflict can be interpreted by examining the viewpoints of everyone affected by the conflict.
   d. The conflict must be dissected and analyzed in order to be understood.
6. According to the circle of conflict, what are the six primary causes of conflict?
7. Explain how human needs theory can be used to explain a conflict that erupts between an employee and her boss after the employee was fired from her job.
8. List five of the essential basic human needs.

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Conflict Resolution Skills

4

Learning Outcomes

After reading this chapter, you will be able to:

- Apply effective communication skills to conflict situations.
- Appreciate the relationship between verbal and non-verbal communication.
- Recognize the importance of active listening.
- Identify unique considerations with written communication.
- Use email to communicate professionally with others.
- Understand how effective conflict resolution skills can facilitate the resolution of legal disputes.
- Apply the concepts from this chapter to a recurring conflict case scenario.

Introduction

While lawyers are often admired for their advocacy skills, logical reasoning, and ability to rationalize, they are rarely recognized for expertise in *resolving* conflict. By extension, the same way of thinking applies to paralegals and other legal professionals. Historically, legal representatives have been taught how to argue and compete in order to win a case for their clients in court. Yet one of the most important skills in the legal profession is the ability to effectively resolve conflict outside of the courtroom. Fortunately, most law programs now offer practical, skill-based courses in alternative dispute resolution (ADR) in order to train future practitioners on the skills needed to deal with the matters that can be resolved without a trial.

As stated by Mayer, "Given the extreme variations in the ways people communicate … it is amazing that we ever understand each other at all."[1] Effective communication is an essential life skill that forms the foundation of all relationships and creates an opportunity for conflict resolution. This skill is necessary in order for legal representatives to understand a client's position and interests. Applying proper communication during settlement discussions can create opportunities for resolution. However, some representatives lack this critical skill or intentionally use questionable communication strategies. In these situations, there is the potential that legal conflicts will remain unresolved or perhaps even worsen. Interpersonal and professional relationships can be enhanced by learning the skills to properly communicate with others in order to work through the issues embedded in conflict situations.

Communication involves more than simply stating facts, positions, and entitlements. It also involves appropriate speaking skills, the proper use of non-verbal communication, active listening, and the ability to relate to and empathize with others. Legal representatives need effective communication skills in order to advocate for their clients' best interests and to help clients work through their legal disputes.

In this chapter, we identify and discuss some of the skills that are necessary for the successful resolution of legal matters, including effective communication (both verbal and non-verbal), active listening, and clear written communication.

Verbal Communication

verbal communication
conveying messages to others through the spoken word

Verbal communication refers to conveying messages to others through the spoken word. It is seemingly simple to say exactly what we mean, yet exceedingly difficult to ensure that the message was received and understood in the way that was intended. Messages conveyed through verbal communication can easily be misunderstood and misinterpreted. At times, the wrong interpretation of another person's words can escalate a conflict and interfere with settlement.

The need for effective verbal communication applies when participating in all types of dispute resolution processes, both formal and informal. According to Barsky, "The trick is to learn how to speak persuasively and assertively, without coming across as combative or presumptuous."[2] This is not an easy task for legal representatives, who are often trained to communicate in a confrontational and aggressive manner. Since

1 B Mayer, *The Dynamics of Conflict Resolution: A Guide to Engagement and Intervention*, 2nd ed (San Francisco: Jossey-Bass, 2012) at 101.

2 AE Barsky, *Conflict Resolution for the Helping Professions* (New York: Oxford University Press, 2017) at 48.

there is no standard formula that can be applied across all situations, much of the skill comes from personal awareness and regular practice. In order to ensure appropriate understanding, representatives must be conscious of their delivery of content and reaction to their statements.

With verbal communication, a message is conveyed through both the **manifest content** and the **latent content**. The manifest content is the actual words (i.e., what is actually being stated), and the latent content refers to what is implied or suggested by the cues that help to interpret the content (e.g., tone, facial expression, and body language).[3]

manifest content
the actual words being spoken

latent content
the non-verbal cues that assist with interpretation, including tone, facial expression, and body language

Content of the Message

When addressing a party in a conflict situation, it is important to ensure that the content of the message is properly understood. This can be achieved by speaking with clarity, without blame, and with a focus on moving forward.

Clarity Clear verbal communication involves speaking to be understood. There is no room for ambiguous language and no need for legal jargon or complex terminology. However, the language historically used in law is neither clear nor easily understood. Consider the following anecdote from a book written close to two centuries ago that suggests how a lawyer might describe the sale of an orange:

> "I give you all and singular, my estate and interest, right, title, claim and advantage of and in that orange, with all its rind, skin, juice, pulp and pips, and all right and advantage therein, with full power to bite, cut, suck, and otherwise eat the same, … or give the same away, with or without its rind, skin, juice, pulp, and pits, anything hereinbefore, or hereinafter, or in any other deed, or deeds, instrument or instruments of what nature or kind soever, to the contrary in any wise, notwithstanding."[4]

The legalese in this quotation has taken a simple concept and made it complicated. As a general rule, any type of settlement discussion should attempt to do the opposite: take a complicated situation and make the solution seemingly apparent, logical, and reasonable. When discussing a client's case, it is important to remember that there is great potential for the message to be misunderstood if legal jargon and complex terminology are used throughout the conversation, particularly if clients are present at the discussion or if the opposing party is self-represented. Mayer writes, "Conflicts are both exacerbated and alleviated by the language we use to characterize them."[5] With this in mind, while striving to alleviate conflict, it is important to be conscious of the language in your statements, as well as the impact that language has on the recipient of messages and on the relationship between conflicting parties (e.g., be aware of unintended trigger words or sensitive topics).

Remove blaming language When attempting to achieve a settlement for a legal matter, it is counterproductive to use blaming language. Making a statement that includes accusatory language or attempts to blame another party can cause the

3 C Ewert et al, *Choices in Approaching Conflict: Principles and Practice of Dispute Resolution* (Toronto: Emond, 2019).

4 A Symonds, *The Mechanics of Law-Making* (London: Edward Churton, 1835) at 75.

5 Supra note 1 at 201.

conflict to escalate if the opposing party responds by taking a highly defensive stance. Instead of working toward resolution, the parties become increasingly polarized and locked into their positions. It is not necessary to assign blame at this stage. If the matter proceeds to trial, the judge will attribute fault or determine liability, but assigning blame is not productive during attempts to settle. Careful choice of wording is critical in order to allow discussions to take place without either party feeling as though they are being faced with accusations. The use of blaming language can destroy the trust between the parties and decrease the likelihood that they will be willing to collaborate on a resolution.

When people feel blamed, the focus shifts away from what the speaker has said and moves toward defensive strategies. As soon as the listener hears the word "you" (e.g., "you should have…", "why didn't you…"), the tendency is to deny the accusation and deflect the blame back to the speaker or upon someone else. In many cases, the listener has stopped paying attention to the speaker and is focused on formulating a response.

HOMEOWNER–CONTRACTOR DISPUTE

Statement A: "Explain why you failed to build the deck properly."

Statement B. "We should discuss the construction issues relating to the deck."

Clearly, Statement A assigns blame to the contractor and will likely force the contractor into a defensive or aggressive mode of response. Statement B identifies an issue without making the contractor feel threatened.

Future focus It is helpful to present statements with a focus on the future. Too often, people in conflict tend to focus on the past—a need to re-live what has already happened. However, the past is behind us and cannot be changed. And in many cases, dwelling on the past will only frustrate the listener, who cannot change what has already been said and done. While the context of past issues and the history of the relationship are important to achieve a preliminary understanding of the conflict, moving toward resolution will occur only when the parties are willing to move forward without continuing to drudge up past disputes. Questions such as "How can we make sure this does not happen again?" or "How can we put this behind us and move forward?" will often help the parties to focus on a resolution.

Delivery of the Message

While it is important to be conscious of the wording, it is also critical to be aware of *how* the message is delivered. The speed, tone, and articulation will all affect how the message will be received.

Speed The speed of speaking should be at a standard, conversational pace that allows for proper articulation and is never too rushed. People who speak too quickly can be seen as nervous, anxious, or lacking in self-confidence. The term *fast-talk*, often attributed to salespeople or swindlers, is commonly interpreted to refer to the method of speaking by someone who applies pressure or misleads another by using quick, confident speech patterns. Opposing parties may also interpret fast-paced legal talk in the same manner.

Tone The speaker's tone should fluctuate in order to place emphasis on key components of the statement. Legal professionals should be careful not to be condescending, but instead should use a tone that captures the attention of the listener. The tone should reflect the substance and emotion of what is being discussed. It is important to be conscious of whether the tone appropriately reflects the content. For example, a discussion with the prosecutor related to a highway traffic accident that resulted in a fatality or significant injuries should be discussed in a manner that reflects the serious nature of the charges.

Articulation Proper articulation of each word will help with the listener's comprehension and increase the speaker's credibility. As an example, someone who continually mispronounces a common legal term will lose credibility with their audience.

Effective advocates appreciate the importance of delivering their message using the appropriate speed, time, and articulation. To make others want to listen, legal professionals should speak zealously, with an interest in what they are saying, and with emphasis on key aspects of the message.

ACTIVITY: MONITOR VERBAL COMMUNICATION

Try to be more aware of your own verbal communication tendencies. In order to understand how you are perceived by others, try taking a series of video clips of yourself explaining the facts of a case and delivering your opening position. Watch for subtle differences in the video clips and try to imagine how others will respond to the way you have presented your case.

Reaction to the Message

It is important to be aware of the listener and their response to what has been stated. In social psychology, **self-monitoring** is a concept that supports closely monitoring another party's reaction to what has been said or done and adjusting the wording and behaviour in order to achieve a favourable response and approval. This concept can be especially relevant to conflict resolution. Instead of simply reading verbatim from a prepared settlement offer, watching the reaction from the other party allows a legal representative to present an offer in a manner that is most likely to achieve a favourable reaction. In many cases, it is not just what is being said but also how it is being stated. Be aware of the listener's body language, facial expressions, and glances toward others who are present in the room. Sometimes a quick glance from a client to their legal representative can be very telling. Self-monitoring is also helpful in recognizing when to stop talking and allow the other parties an opportunity to contribute to the discussion.

self-monitoring closely monitoring another party's reaction to your statements and adjusting your words in order to achieve a favourable response and approval

Effective Communication

Non-Verbal Communication

non-verbal communication the expressions and visual cues that supplement the verbal aspect of communication

Even when we are not speaking, we are continuously sending messages through our non-verbal communication. As the term suggests, **non-verbal communication** includes the expressions and visual cues that supplement the verbal aspect of communication. Proper non-verbal communication enhances what has been communicated verbally. Forms of non-verbal communication includes facial expressions, making eye contact, gestures and body language, and stance or body orientation.

Facial expressions: Facial expressions can provide insight on a person's emotional state. Reading facial expressions may be an accurate interpretation of a person's mood or it might give an indication of their feelings towards a statement or event. However, there is a danger in attributing too much weight about a person's overall character to their facial expression. Facial expressions can change moment by moment and are not necessarily a long-term reflection of character. We tend to assign certain characteristics to someone who displays a pleasant facial expression. A person who smiles a lot is perceived to be friendly, approachable, warm, and helpful. By contrast, someone with a sombre expression would be perceived in a more negative manner. These assumptions could be accurate or they could be attributed to an entirely different occurrence or situation. As an example, the person who is frowning may be experiencing a headache that influences their facial expression, but others interpret it to be a reflection of their mood or as part of their reaction.

Eye contact: Making eye contact can make a great impact on the way people respond. A person who looks the listener straight in the eye comes across as sincere, honest, and confident. Since they are seen to be more persuasive, it often leads to a favourable response. Yet a refusal to look someone in the eye often suggests that there is something to hide or that the speaker is being less than truthful. It is important to recognize that there may be other possible explanations for someone who will not make eye contact: shyness, not wanting to come across as aggressive, or the person may be obeying their cultural norms where it is considered impolite or disrespectful to look an elder directly in the eye.

Additionally, eye contact should be used in moderation because continual fixed eye contact can be perceived as overly intense and intimidating. Legal professionals should always pay attention to cues from the listener in order to determine when to break eye contact and when to continue with it. A party's credibility as a witness in court and in ADR is often influenced by their body language, especially their degree of eye contact.

Gestures and body language: Gestures and body language can act as interpretive aids to understand the context of a situation. The way a person carries themselves can give clues to their level of interest and agreement.

Stance or body orientation: Stance (or body orientation) can display how a person is feeling about a particular situation. When interpreting non-verbal communication, recognize that crossed arms and legs or hands placed on the hips could imply that the other person is not receptive to the statements. Body orientation that is directed towards the speaker suggests that the listener is interested and willing to engage in a discussion, but a turned or slumped body positioning shows disinterest or resistance. When speaking, be sure to present yourself with a relaxed body stance and receptive body orientation.

Since we tend to look for non-verbal cues, especially when the verbal message is unclear or ambiguous, it is essential that the non-verbal part of communication be consistent with the verbal aspect. For example, a paralegal or lawyer would not stare at the ceiling, with their arms raised in victory and a jovial facial expression, when telling a client about an impending jail term. Legal professionals should understand how to interpret and transmit non-verbal communication in order to read others and to ensure that their own non-verbal communication is consistent with the messages they are trying to convey.

PRACTICE TIP

Being Aware of Your Own Non-Verbal Communication

Remember, just as you are trying to interpret another person's non-verbal communication, they are doing the same to you. The interpretation of your communication—rightfully or wrongfully—will be based on the way you have presented yourself through your non-verbal cues.

Interpretations of Non-Verbal Communication

Whether we intend for it to be interpreted this way or not, certain physical indicators suggest one of three possible modes of response: aggressive, responsive, and non-responsive.[6]

Aggressive mode of response: This response applies to a party who is becoming increasingly angry, impatient, or frustrated. Defensive responses fall under this category, such as when the person wants to justify their actions or deflect the blame to someone else. Physical indicators may include finger- or foot-tapping, staring, leaning

6 Ewert, supra note 3 at 101.

forward, finger-pointing, fist-clenching, and moving into the other party's personal space. It can be difficult to deal with a client or another representative who is exhibiting this type of competitive behaviour, as it may indicate an unwillingness to work toward a resolution.

Responsive mode of response: A person who is interested in a topic and is paying attention is responsive. Physical indicators may include nodding, holding the end of a pencil in the mouth, stroking their chin, pursing their lips, and rubbing their neck or head. A responsive party may also incline their head toward the speaker, make frequent eye contact, maintain a high blink rate, lean toward the speaker, and smile. Responsive behaviours tend to include active listening and collaborative problem-solving.

Non-responsive mode of response: A person who is not interested in discussing a topic is considered to be non-responsive. Physical indicators of non-responsiveness may include staring into space, slumping, doodling, foot-tapping, chair-swivelling, putting on a jacket, looking around the room, sorting through materials, sitting back with arms crossed, putting the head down, frowning, or packing things up. An opposing party who displays non-responsive behaviours may be attempting to avoid a confrontation or may be unwilling to discuss the issue at that time.

ACTIVITY: MONITOR NON-VERBAL COMMUNICATION

We are always recipients of the non-verbal communication projected by others, but we tend to be unaware of the messages sent through our own body language. The videos that you created earlier in this chapter to monitor your verbal communication can also be used to focus on your non-verbal communication. Replay the videos with the volume fully turned down. Watch your facial expressions and body language to see the way others see you. Make note of how often you look away, touch your hair, and scratch your head, and look for other unique habits you may have.

Active Listening

It is important to be a good speaker in order to communicate effectively, but it is equally important to be a good listener. Remember, a lot more is learned through listening than speaking. Strong and effective listening skills can support the ability to resolve conflict. Listening includes much more than hearing the words that someone else is speaking.

active listening
taking an interest in what people have to say and being an attentive recipient of the information

Active listening involves taking an interest in what people have to say and being an attentive recipient of the information. It is a skill that does not come naturally to most people, but it is one that can be achieved with concentration and effort. Barsky writes,

> Active listening refers to the intentional use of self in order to demonstrate to a speaker that you have heard and understood what the speaker has said. If you listen passively, you may have heard and understood the speaker, but the speaker has no way of knowing this.[7]

The word *active* suggests that the listener has a role in the conversation. The role is to be engaged and to contribute to the conversation. However, the contributions do not include projecting personal opinions, ideas, or solutions on the other side. Instead, the contributions made by the listener are intended to support and encourage the speaker to continue talking, and not to interrupt or lead the conversation.

7 Supra note 2 at 43.

Active Listening Techniques

The types of contributions made by the listener can include a number of different active listening techniques, including offering minimal encouragers, paraphrasing, reframing, and suspending judgment.

Minimal encouragers: **Minimal encouragers** are short phrases or utterances that demonstrate to the speaker that they are being understood and should, therefore, continue to speak. Minimal encouragers do not alter the course of the conversation and instead allow the speaker to finish statements without interruption, influence, or judgment. Examples of minimal encouragers include expressions such as "uh-huh," "I see," "yes," and "hmmm." Although minimal encouragers do not add value or content to a conversation, they do show the speaker that their content is being followed.

minimal encouragers
short phrases or utterances that demonstrate to a speaker that they are being understood and should continue to speak

However, there are some dangers in using minimal encouragers. Repetitive and robotic use of the same minimal encourager (such as "uh-huh") may be interpreted as disinterest and a lack of active engagement. Therefore, an effort should be made to consciously use a variety of different minimal encouragers. Similarly, inserting minimal encouragers too frequently will make it seem as though the speaker is being rushed to finish speaking. A further danger with the use of some minimal encouragers is that they could suggest agreement instead of just the intended acknowledgment. For example, using "yes" and "uh-huh" throughout a client's intake meeting, may come across as being supportive or in favour of what is said instead of the intended acknowledgement while they are speaking. In this case, the minimal encouragers should be followed with specific comments that will indicate the level of agreement and understanding.

Paraphrasing: **Paraphrasing** is the rephrasing, in a listener's own words, of what a speaker has said. It is a way to check whether what was stated has been understood and demonstrates that the listener is following the story. A key to effective paraphrasing is to adapt the wording—no one wants to hear an exact repeat of what has just been said. This strategy also helps the listener to remain focused and prevents their mind from wandering.

paraphrasing
the rephrasing, in a listener's own words, of what a speaker has said

Reframing: There are times when paraphrasing can be counterproductive. Consider a situation where the speaker's comments are filled with negativity and blame-ridden language. Repeating the same content back to the speaker tends to reinforce the negativity. Instead of paraphrasing, it may be more effective to reframe. The purpose of **reframing** is to remove the negative language and replace it with positive or neutral language, placing a positive or refocused spin on what was said. For example, instead of saying, "You feel the deck was not built properly," a reframed statement says, "It is important for you to have a properly built deck."

reframing
the act of removing ne language and replacir positive or neutral la

Suspending judgment: People have difficulty resisting the urge to debate, argue, or disagree with someone else. In his discussion of suspending judgment, Isaacs explains the "wrong way" for responding to a speaker:

> "[W]e can choose to defend our view and resist theirs. … [W]e can try to get the other person to understand and accept the 'right' way to see things (ours!). We

can look for evidence to support our view that they are mistaken, and discount evidence that may point to flaws in our own logic."[8]

Instead, Isaacs proposes that we must consciously engage in suspension of judgment. This is especially relevant for legal professionals who have a strong knowledge of law and may be tempted to demonstrate such knowledge. Instead, they should resist the urge to present a counterargument and simply try to listen to and understand the message that is being conveyed.

Strategies to Enhance Active Listening

Even those who have highly developed active listening skills must continuously work hard at applying these skills. Legal professionals should make a conscious effort to make clients, opposing parties, and representatives feel as though their comments are encouraged and understood. In addition to the techniques discussed above, there are some additional tips pertaining to choosing an appropriate location, having an open mind, and seeing things from another perspective that can be applied to enhance active listening skills.

Location Consider the location where the discussion will take place. It should be a quiet, private environment with minimal distractions. For example, it would be preferable to meet in an office or boardroom instead of in a coffee shop or the lobby of a courthouse. However, there may be times when discussions will have to take place in a more public setting (e.g., during a brief recess in court when there is not enough time to return to the office). In these situations, trying to find the most private area within the public setting will help to minimize distractions, maintain confidentiality, and ensure that the necessary undivided attention is being provided (e.g., you could stand facing the listener, with your back to everyone else).

Open mind Keep an open mind and focus on trying to understand what the speaker is saying. You will have an opportunity to address the issues that are raised, but it does not have to be at the settlement discussion stage. Resist interrupting or judging, and do not rush into offers or solutions. Ask brief questions to clarify when there is a need to obtain more information, but do not turn it into a series of interrogative questions. Allow the speaker to direct the course of the discussions. Too many questions will interrupt the speaker's train of thought.

Perspective The age-old expression "putting yourself in someone else's shoes" means to see things from someone else's perspective—to try to realize what others are going through, how they are feeling, and what they want. Recognize that they have a different perspective. This ability to empathize will show support.

written communication conveying messages to others through the written word, including mail, fax, email, and text

Written Communication

Strong **written communication** skills are essential in a legal environment. Legal professionals will have an ongoing need to communicate in writing to clients, opposing parties, other legal professionals, the court, colleagues, and the staff within the office. To effectively convey the required information, complex and lengthy content should be presented as a clear, concise summarized version. There is also a competing need for the content to be persuasive and informative. This can be a difficult balance to achieve, made even more difficult by the potential for misunderstanding and conflict that written communication carries.

The types of written communication that may be encountered in an ADR context range from legal memos kept within client files, to informal discussions via email, to requirements to submit paperwork prior to a mediation or arbitration session. Regardless of what is being communicated, it is important to review the written communication to ensure that it does not cause misunderstanding or further conflict.

Written Communication Within Client Files

Legal professionals are taught to keep comprehensive notes and to document every incident or conversation related to a file or client. Being detail-oriented can certainly help to keep track of the progress on the matter, but does create a significant amount of paperwork to review for any particular file.

PRACTICE TIP

Recognizing the Value of Detailed Notes

Periodically, legal professionals should draft an updated "Memo to File" in order to summarize the current status of the file. Not only is this useful when a new legal professional is assigned to a file, but also it is essential so that the most important details are readily available in the event that an emergency arises and the file has to be assigned to someone else (e.g., being unexpectedly hospitalized means that another representative could quickly step in to assist the client).

Since there is less delay in scheduling ADR processes (e.g., a negotiation may be set with a week's notice or a mediation may be scheduled within a month instead of waiting several months for a court date), files should always be accurate and up to date in case someone else has to step in at the last minute.

In order to avoid disagreements and conflict with clients, detailed written notes are also important for billing purposes. By keeping thorough dockets it is possible to send a detailed statement of account to your clients. If everything is properly documented, there is less potential for conflict and less chance that a complaint will be made to the Law Society of Ontario. Yet even if a complaint is made, the detailed notes within the file will help clarify any misunderstanding if faced with an investigation or disciplinary hearing.

8 W Isaacs, *Dialogue and the Art of Thinking Together. A Pioneering Approach to Communicating in Business and in Life* (New York: Doubleday, 1999) at 134.

Written Communication to Others

At times, legal representatives will communicate in writing with opposing parties, legal representatives, and other legal professionals. Conflict and misunderstanding can arise when the reader does not properly understand the message in the way it was intended. One of the difficulties with written communication is that it relies solely upon the manifest content. There is no latent content to help with the interpretation.

Correspondence sent through the mail or by fax and messages sent via email or text are vulnerable to misinterpretation in the absence of the interpretive latent content. The same words can have substantially different meanings. For example, the words "that's great" can have a positive interpretation if the tone is enthusiastic and spoken with the speaker smiling. By contrast, "that's great" could also be interpreted as negative if presented with a sarcastic tone while the speaker rolls their eyes.

When communicating in writing, it is important to be mindful of the reading audience. Adapt the writing style to meet the needs of the anticipated reader. While it might be appropriate to use legal terminology when communicating with an experienced lawyer, paralegal, mediator, or arbitrator, it would not be appropriate to do so if the written communication would be read by a client with limited past exposure to the legal system.

Over the past couple of decades, there has been a plain language movement in law. Instead of complicated legal jargon, legal professionals are consciously attempting to use simple, coherent language in their communication. The table below demonstrates some examples of common Latin legal jargon and its plain language meaning:[9]

TABLE 4.1 Legal Jargon and its Meaning

Legal Jargon	Plain Language Meaning
Ad infinitum	Forever
Bona fide	Legitimate or qualified (literally "in good faith")
Habeas corpus	A writ to bring a person before the court
In absentia	In his or her absence
Ipso facto	By that very fact
Obiter dictum	Judge's commentary apart from the main decision
Prima facie	At first sight
Pro bono	Done for free; for the public good
Res ipsa loquitur	It goes without saying
Sine die	Postponed indefinitely
Ultra vires	Beyond a person's authority

Email Communication

The efficiency and immediacy of email communication make it popular in a legal environment. Presenting an offer to settle by email means that it will be instantly received by the other representative. However, most people tend to write informally and less professionally in an email message than in other forms of written communication. It can be difficult to maintain a professional legal tone with email correspondence. The following tips are designed to help with maintaining a proper tone and avoiding a misunderstanding when using email:

- Use an appropriate subject heading for each message. This will make it easier to find messages that need to be reread at a later date.
- Delete long chains of past messages. At some point, the message could be forwarded to another person who would then have access to all of the prior content.
- Print copies of emails that may be needed in the future and keep them in the file.
- Be conscious of how easily and quickly messages could be forwarded to other parties. Consider including a clause intended to limit the distribution of the message.
- Do not use full capitals in a message as this is interpreted as yelling and could aggravate or escalate the conflict.
- Proofread email messages. Careless errors will seem unprofessional and could provide inaccurate information.
- Use a standard email signature and all of your contact information at the end of email correspondence.
- Remember to attach any attachments that are referenced in the body of the message.
- If a reply from the reader is required, clearly state this in the body of the email. Set deadlines if necessary (for example, "This offer to settle will remain open until 5:00 p.m. on Friday, January 5").
- Use a professional email address—ideally with the name of the firm (e.g., not "cutiepie123@sample-email.com").
- Review the message and consider ways that it could be misinterpreted by the reader.
- Remember that email correspondence never gets permanently deleted.

9 Adapted, in part, from CA Hull, SR Perkins & T Barr, *Latin for Dummies* (New York: Hungry Minds, 2002) at 211.

While there are a number concerns with written communication, there are also benefits. When communicating in writing, there is time to think about what to say and how say it. Additionally, there is an opportunity to edit correspondence before sending it to the reader. Take advantage of this opportunity and do a thorough edit to minimize the likelihood of conflict. "With written communication, the writer has the benefit of more time to ensure that the messages are conveyed clearly, concisely, and non-judgementally."[10] Legal professionals should take the time to choose their words carefully when initiating or responding in writing and when preparing briefs or settlement agreements.

Communicating with a Client

One of the most common complaints that clients make about their legal representative is poor communication. By incorporating appropriate communication techniques and using proper practice management procedures, legal professionals can ensure that they communicate effectively and avoid potential complaints. While much of this communication is conducted verbally, a written summary of the discussions should be provided to the client in order to avoid a potential misunderstanding.

Conducting the Initial Client Interview

The formalized client interview phase allows legal representatives to collect information and to ask questions. Please see Figure 4.1 For an explanation of different questioning types. Conducting an effective client interview is a fundamental skill required by all legal professionals. In preparation for a client interview, it is important to have an understanding of:

- the relationship with the client,
- the relationship between the parties,
- any ethical considerations relating to the case,
- whether information about the matter can be shared with anyone else,
- the best approach to elicit clarity of information, and
- any information that helps the client to make an informed decision about who to retain.

The client interview, when performed correctly, will provide the evidence needed to begin to formulate the theory of the case and will expose any additional evidence that will be needed to fill in whatever gaps exist. Please see Appendix E, "Meeting the Client for the First Time" and Appendix F, "Practical Interview Tips," to this chapter for additional resources to help with the client interview. Once the facts have been assessed, the next step will be to outline any options that are available.

10 Barsky, *supra* note 2 at 51.

FIGURE 4.1 Question Types with Examples

- **Open-ended questions**
  Use open-ended questions to:
  - elicit an expansive answer
  - allow responder to answer with a variety of answers
  - invite someone to provide a lot of information
  - allow responder to think out loud about the reasoning
  - obtain more than a one- or two-word answer
  - help listener discover other perspectives
  - gather a lot of information about a subject

  Examples of open-ended questions include: "What do you mean by ...?" "Tell me more about ...?" "How did you decide that?" or "Can you think of any possibilities?"
- **Closed-ended questions**
  Use closed-ended questions to:
  - obtain specific, detailed information
  - re-focus someone who may have gotten off track

  Examples of closed-ended questions include: "What colour was the ...?" "How many ...?"
- **Clarifying questions**
  Use clarifying questions to:
  - bring out more information or clarify a point
  - clear up any confusion or misunderstanding
  - allow process to flow smoothly

  Examples of clarifying questions include: "Can you explain what you mean by ...?" or "Did you mean ...?"
- **Consequential questions**
  Use consequential questions to:
  - encourage clients to use their perspective to consider the consequences
  - take the time to consider the outcome

  Examples of consequential questions include: "Let's say ... what would happen ...?" or "If this happens, what would you ...?"
- **Justifying questions**
  Use justifying questions to:
  - resolve inconsistent or contradictory statements
  - ensure clarity and understanding

  Examples of justifying questions include: "Have you changed your mind about ...?" or "Can you clarify which one ...?"
- **Probing questions**
  Use probing questions to:
  - explore ideas
  - obtain a more expansive response
  - encourage discussion about things people may be reluctant to discuss

  Examples of probing questions include: "Can you explain that in more detail?" or "How did you feel when ...?"
- **Hypothetical questions**
  Use hypothetical questions to:
  - make suggestions and generate new options
  - suggest a scenario that the other person can evaluate
  - decide on various options

  Examples of hypothetical questions include: "What if ...?" or "How would you react if ...?"

Discussing How to Proceed

When discussing how to proceed with a client, it is important to remember your fundamental training as a legal representative, the rules of conduct that may be applicable (e.g., *Paralegal Rules of Conduct*) and to recognize the duty to the client as a fiduciary. Legal representatives must provide clients with legal advice and representation to the best of their ability, always keeping the client's best interests in mind and doing so with unfettered integrity and a high ethical standard. After reviewing the case, it is time to provide the client with an understanding of the path forward, recognizing the substance and process of the law.

At some stage shortly after the initial client interview, the client should be presented with options, risks, and recommendations. Inform the client of the various options that they may have, but also be sure to inform them of the risks and costs associated with each option. It is also appropriate for a legal representative to provide recommendations to their client which should include setting out their ADR options. The client's decision must be made in light of the law, in anticipation of the evidence that will be presented and with consideration of the expected reaction from the other party. Legal professionals should play a cautionary role for the overly optimistic or aggressive client—it is important to help the client visualize a realistic settlement to the matter.

Obstacles to Effective Communication and Listening

Despite the fact that we should all be highly skilled communicators, since we practise these skills continuously in all of our relationships, poor communication is often to blame when discussions and negotiations break down in a legal setting. Many obstacles can stand in the way of effective communication. Understanding these obstacles can provide opportunities to address the underlying conflict. Consider the following obstacles to effective communication and proper listening: language barriers, selective listening, emotional content, lack of preparation, unwillingness to discuss, and lack of urgency or deadline.

Language barrier: According to Statistics Canada, more than 215 languages were reported in the 2016 Census of Population as a home language or mother tongue.[11] With such linguistic diversity in our society, it can be problematic to assume that even plain language terminology will effectively convey a message to others. This diversity can cause difficulties for both speakers and listeners. Solution: If there appears to be a language barrier, find out whether a friend or family member may be able to assist by interpreting the discussion.

Selective listening: In any type of conflict situation, people may hear only what they want to hear. This is especially true for a client who is personally attached to, and involved in, a legal dispute. Clients will often expect their representative to take their side and agree with the way they see things. Solution: To overcome this obstacle, be clear with clients and follow up with written correspondence to confirm what was discussed. Be sure to highlight both the positive and negative aspects of their case and explain the likelihood of success.

Emotional content: Legal matters tend to be highly emotional for parties in dispute. When a client is upset or angry, that client may not be able to focus on a resolution or discuss settlement in a rational manner. Solution: A client who is too emotionally charged should be advised to provide detailed instructions to their legal representative, but may want to refrain from attending the settlement discussion—especially if the other party is likely to be present. The legal representative should make arrangements for their client to be available by phone should they need to be in contact.

Lack of preparation: Preparation is key to communication for the purpose of trying to resolve the matter. Representatives who have not taken a reasonable amount of time to meet with their clients and review the necessary files will not be appropriately prepared to engage in real, substantive problem solving. Solution: Preparing for any ADR process should be handled in the same manner as preparing for trial. It is not acceptable to show up to a meeting just to "see what the other side has to say" since this may result in a poor agreement, or no agreement, being made. The general rule of thumb is that we should spend an equal amount of time preparing to negotiate as we actually spend negotiating.

Unwillingness to discuss: Despite the fact that the ethical rules of conduct from the provincial law societies (e.g., in Ontario the *Paralegal Rules of Conduct* and the lawyer's *Rules of Professional Conduct*) require an effort to settle each and every legal matter, there may be times when the opposing party is not willing to communicate. This could be the sign of an unprepared representative, or it could be a stalling technique (such as to extend the requirement for the defendant to pay the plaintiff).

If it is not in the client's best interest to resolve the matter before the trial date, there is little incentive for the representative to discuss it with the opposing party. Solution: Try to communicate in writing, suggest potential dates to meet and present any offers. This will demonstrate an effort to resolve the matter even if the other side is unwilling.

Lack of urgency or deadline: An impending trial is often an incentive to try to resolve a matter. The old saying that a matter was resolved "on the courtroom steps" or "at the 11th hour" suggest that communication becomes a lot more productive when there is a deadline in place. Often the "real offers" are not presented until a deadline approaches. Solution: This obstacle is difficult to resolve but continued efforts to collaborate with the other side may make some progress.

11 Statistics Canada, *Linguistic Diversity and Multilingualism in Canadian Homes, 2016 Census of Population* (Ottawa: Minister of Industry, 2017) at 1.

RECURRING CASE STUDY

Application of Conflict Resolution Skills

To briefly recap what has taken place so far in the scenario, Angela suffered $1,000 worth of water damage to her personal belongings as a result of a problem with the pipes in her basement apartment. She presented a summary of the damages to her landlords, Mary and Leo, but they are only willing to pay $60.

Some of the conflict resolution skills that are apparent in this scenario will be identified and discussed in order to identify what the parties could improve upon. Please review the facts of the Recurring Case Study, as set out in Chapter 1 to Chapter 3.

Discussion of Scenario

- *Remove Blaming Language*: It is counter-productive to use blaming language because it will usually escalate the conflict. Leo should not have blamed Angela for the leak and made accusations that she was trying to steal money. These types of statements can polarize the parties, lock them into their positions and can increase the likelihood that Angela would become defensive.
- *Non-Verbal Communication*: Leo's behaviour was an aggressive mode of response. His anger was projected through his actions as well as his words. Specifically, he moved into Angela's personal space and waved his clenched fist in her face.
- *Active Listening*: Leo did not give Angela the chance to get a word in edgewise. By using active listening, the parties may have been able to have a more productive discussion.
- *Written Communication*: Angela's text reply to Mary of "OH GREAT" could have been interpreted as either a positive or negative response. Since the written communication relies only on the manifest content and is missing the latent content, it is vulnerable to misinterpretation. As well, the use of full capital letters can be interpreted as an aggressive response (e.g., yelling), which can escalate the conflict.

CHAPTER SUMMARY

In order to resolve conflict, legal professionals must use effective communication skills. By paying particular attention to verbal and non-verbal communication, they will be able to communicate effectively with clients, other professionals, and opposing parties. Active listening is an essential component of communication and can assist in learning more about the conflict and opportunities for resolution. Since there is no latent content to help interpret written communication, care must be taken to ensure that letters, emails, and even text messages are written in a clear and concise manner. While it takes time and effort to communicate more effectively, these skills can be achieved through deliberate effort and practise. Legal professionals will use a range of techniques and methods to effectively communicate with their client throughout the entire process—from initial client interview to the ultimate resolution of the matter.

KEY TERMS

active listening, **84**
latent content, **79**
manifest content, **79**
minimal encouragers, **85**
non-verbal communication, **82**
paraphrasing, **85**
reframing, **85**
self-monitoring, **81**
verbal communication, **78**
written communication, **86**

REVIEW QUESTIONS

1. When telling your friend, Hubert, about a conflict at work, you notice that as he is listening, he is stroking his chin and pursing his lips together. Which mode of non-verbal response is Hubert displaying?
   a. Aggressive.
   b. Responsive.
   c. Non-responsive.
   d. Disinterested.
2. As the plaintiff's representative, Kumar, was listening to your offer to settle, he started to point his finger at you while moving closer with his fists clenched. What mode of non-verbal response is Kumar displaying?
   a. Aggressive.
   b. Responsive.
   c. Non-responsive.
   d. Frustrated.
3. How does Barsky recommend we speak in order to facilitate effective communication?
   a. Persuasively and assertively.
   b. Combatively and presumptuously.
   c. Competitively and passionately.
   d. Convincingly and aggressively.
4. Which of the following is an example of reframing the following statement: "He is wasting my time—he has no intention of settling this matter today"?
   a. You were hopeful that the settlement discussion would be productive and in good faith today.
   b. You feel that he is wasting your time because he has no intention of settling this matter today.
   c. You are angry that there has been no settlement today.
   d. You do not want to negotiate anymore.
5. Which of the following is an example of paraphrasing the following statement: "I am so upset that my best friend would take advantage of me by not paying back the money they promised to return"?
   a. You are so upset that your best friend would take advantage of you by not paying back the money they promised to return.
   b. You wish that everyone would honour their debts.
   c. It is upsetting for you to have your close friend break a promise about paying back a debt.
   d. You are angry about their disregard for your friendship and unwillingness to pay back some money.
6. What is the best way to gather a lot of information from a client?
   a. Ask a justifying question.
   b. Ask an open-ended question.
   c. Ask a hypothetical question.
   d. Ask a reflective question.
7. Name three things that legal representatives should be conscious of in their verbal settlement discussions.
8. Explain what is meant by the term self-monitoring.
9. How does self-monitoring relate to legal professionals?
10. Explain why the following statement is likely to be counterproductive in achieving a settlement: "It is your fault. You should have told me about the damage to the apartment."
11. Name three obstacles to effective communication and listening.

DISCUSSION QUESTIONS

Questions 1 through 5 refer to the following scenario:

Teena is a co-owner of T & K Funeral Home. While she provides an important service to people who have lost a loved one, she is still running a business and has to collect outstanding accounts. She always dreads the initial phone call to the estate trustee to discuss payment. Teena would like to resolve matters without hiring a lawyer or taking the trustee to Small Claims Court.

1. Explain why ADR would be a better option than litigation for Teena's collections.
2. What should Teena remember with regard to the delivery of her message?
3. What type of tone should Teena use when discussing the outstanding funeral account?
4. If meeting in person, what should Teena be conscious of in terms of her non-verbal communication?
5. The people Teena deals with are often distressed and emotional. How can she show that she is actively listening to their stories?

What Is Negotiation?

5

Learning Outcomes

After reading this chapter, you will be able to:

- Assess the benefits and risks of negotiation.
- Consider how negotiation affects legal representatives.
- Distinguish between positional bargaining and principled negotiation.
- Establish what style of negotiation best suits a situation.
- Understand the bargaining process and how to create a win–win negotiation.
- Compare and contrast value claiming and value creation in a negotiation.
- Apply the concepts from this chapter to a recurring conflict case scenario.

Introduction

As social beings, we all negotiate in some way every day. For example, we might negotiate with our friends to decide what movie to see; parents may negotiate with their children to clean their room in exchange for video-game time; we might negotiate a salary or vacation days with our employer; and students may negotiate a test date with their professor. Generally, people want to participate in decisions that affect them, so we must all be prepared to negotiate effectively and with confidence.

As we discussed in Chapter 1, "The Importance of ADR for Legal Representatives," the benefits of considering alternatives to resolving disputes, such as negotiation, are vast, and choosing to negotiate can be advantageous to clients. This chapter will provide important advocacy skills necessary for negotiation, emphasizing, highlighting, and critically exploring the important concepts, theories, and practices of negotiation that legal representatives may face.

Negotiation Skills

"Negotiation is not just an essential skill for lawyers; it is an indispensable life skill for every person."[1] Some form of negotiation affects all aspects of our lives, and yet it seems that some people are more skilled negotiators than others. Tom Sawyer famously negotiated a deal with his friends to have them paint a fence when he was assigned the chore that he deplored.

What kinds of skills do good negotiators require? Empirical studies and social scientific research have noted predictable patterns of negotiation behaviour, styles, and stages. Some authors have argued that a successful negotiator's ability is innate, while others assert that any person may become a good negotiator by applying learned skills and techniques. Many successful negotiators will tell you that they are self-made, and "how-to-negotiate" books that suggest anyone can negotiate successfully by employing the right skills and techniques are perennially popular with consumers. For example, James Freund, a lawyer who negotiates professionally, set out his techniques in his book *Smart Negotiating: How to Make Good Deals in the Real World*,[2] and Janos Nyerges, a former special representative of the Hungary government, developed his own "Ten Commandments for a Negotiator."[3]

The Legal Representative's Role in Negotiations

Effective negotiation skills are not only a necessity but also a true survival skill for legal representatives seeking successful outcomes for their clients. Yet much of our legal education continues to focus on training for the courtroom. This is peculiar because only a fraction of disputes end up in court. In fact, over 90 percent of all legal disputes are resolved outside the courtroom and involve some manner of negotiated settlement. Therefore, less than 10 percent of disputes end up being resolved in court. This means that advocates will spend most of their career negotiating settlements with each other or with unrepresented parties.

There is an old saying that "a man who is his own lawyer has a fool for a client." This applies similarly to negotiation; because most people do not negotiate very well on behalf of their own interests, clients often hire **advocates** to negotiate on their behalf. They prefer to rely on an advocate's technical expertise and negotiating skills to help resolve their conflict. For that reason, representatives such as paralegals, lawyers, and other dispute resolution professionals conduct many negotiations for people in the legal world.

advocate an individual who represents others by speaking, pleading, or arguing in their favour and on their behalf to ensure their rights are being upheld

The Basics of Negotiation

There are many definitions of **negotiation**, but for the purposes of a legal representative, negotiation is an alternative method of dispute resolution in which two or more persons communicate in order to reach an agreement on an action or actions to be taken. Each of us has different needs, personalities, and backgrounds that may affect how we handle negotiations.

negotiation an alternative method of dispute resolution during which two or more persons communicate in order to reach an agreement on an action or actions to be taken

Benefits of Negotiation

Choosing to negotiate can be advantageous to clients. First, negotiation is therapeutic and empowering to the parties involved. It provides parties with their own remedies and terms, unlike a judge in a court who has limited remedies that they can order and impose on the parties.

NEIGHBOUR DISPUTE

Consider a conflict between two neighbours, Jose and Nikita. Jose would like to tear down his fence and build a new one in its place. He claims that he contacted his adjoining neighbour and she agreed to pay half of the cost. But the adjoining neighbour, Nikita, argues that she did not agree to pay for a new fence. She recently moved in with her family and did not have the means to pay for it at that time. Nikita was fine with the existing fence and was willing to make repairs and improvements to it. She was surprised when she came home from work one day to find the fence was torn down and a contractor vehicle was in the neighbour's driveway with a huge amount of wood already purchased for the fence and ready for use. Jose came over that evening requesting payment of the wood and tear down by the contractor. Nikita refused to pay. Jose would like to finish the fence but now must consider whether he will have to sue Nikita in small claims court for the payment.

See the comparison below of what a judge might award versus the options available if the parties negotiated a resolution outside of court.

1 C B Wiggins & P L Lowry, *Negotiation and Settlement Advocacy: A Book of Readings* (St Paul, Minn: West, 1997) at vi

2 J C Freund, *Smart Negotiating: How to Make Good Deals in the Real World* (New York: Fireside, 1992) at 14

3 J Nyerges, "Ten Commandments for a Negotiator" (1987) 3 1 Negotiation J 21

Court Remedies	ADR Remedies
Monetary amount that must be paid by either the plaintiff or defendant depending on who succeeds in the legal action.	The neighbours could agree to not hire the contractor further but build the fence together to save on further costs.
	They could hire some students to complete the build.
	They could agree to a payment structure that gives more time for payment.
	They could agree to make payment in another way related to the properties (e.g., cutting grass, doing yard work).

Negotiation can also help reduce conflict by narrowing issues, as well as assist with determining mutually satisfactory goals (such as in a business deal). In addition, negotiation personalizes the conflict resolution process and keeps the matters at issue private. Clients may not want to air their dirty laundry and instead try to keep their matters as confidential as possible. Finally, an important long-term benefit of negotiation is that it helps ease the pressure that conflict can inflict on continuing relationships. When litigation ends, one party wins while the other loses. It is much more difficult to reconcile a relationship with someone who has lost their case.

Barriers to Negotiation

While we cannot always predict which negotiations will escalate the conflict, there are a number of factors that hinder effective negotiation. Many negotiations proceed with minimal adversity and are conducted in a timely manner. Others may develop into a full-blown dispute that is both time-consuming and costly (both in the monetary sense and in terms of the relationship). When one or both parties make demands right from the beginning of the negotiation, both sides become personally committed to their positions and will be unwilling to move from them. They defend their positions unnecessarily, their emotions escalate, and their egos prevent them from assessing the issues. They become defensive and feel that they need to "save face" despite the issues at hand. In short, the negotiation becomes a counterproductive force.

Other common barriers to communication include emotions, miscommunication, and limitations.

Emotions

Negative emotions can elicit fear and anger, and they have a way of escalating and clouding us from seeing the issue at hand. When parties focus too much on their emotions, they are unable to consider the other side's concerns, and the negotiation may soon fall apart. Of course, sometimes parties need to first release their emotion in order to be able to proceed with the negotiation at all. Similarly, perceptions can impact negotiations when one person makes an incorrect assumption about the other person's intentions. Another old saying that can apply to negotiation is that "you will never get a second chance to make a first impression." Perceptions play a powerful role in how we treat others and how we are treated, particularly as it pertains to a negotiation. It may then take a lot of time to change those assumptions. Ego is another huge emotional barrier to negotiations; parties may assume a power position or try to bolster their ego, resulting in short-term gratification instead of focusing on the end result. In response, the other party may leave the negotiating table feeling bullied or offended. Finally, trust or lack of trust, may be an emotional response to the personal relationship and history of the parties or due to an incident between the parties that eroded their trust over the short or long term. These incidents can be unrelated to the issue at hand, but they prevent the parties from moving forward as they are reluctant to rely on the positions presented by the opposing party.

Miscommunication

In general, communication is key to any successful negotiation, as parties communicate back and forth to reach an agreement. Any sort of miscommunication, however, will make it difficult for the parties to move forward with options and solutions. This includes poor listening skills and confrontational tones. (We discussed communication skills in Chapter 4, "Conflict Resolution Skills.") Adversarial and uncooperative attitudes can sabotage any positive outcomes by stirring negative emotions and creating a hostile discussion. Even a simple language barrier can prevent the parties from conveying their intentions.

Limitations

Limited resources, such as finances, options, human needs, time, and materials, can produce significant obstacles to any negotiation. Whether actual or artificial, these limitations may prevent a party from seeing any viable options that will meet their interests. Artificial limitations may also demonstrate a party's unwillingness to negotiate, and this perception may damage the relationship between the parties. If the limits put forth are real and immutable, the parties may have difficulty considering solutions that fit outside the box.

The Goals of Negotiation

A successful negotiation can be difficult to achieve. However, we first need to understand what "success" means in terms of a negotiation. The real goal of a negotiation is to reach an agreement that is effective and satisfactory for all parties. While some may judge the success of a negotiation on whether or not they have "won," this may also mean it was at the expense of someone else who may "lose." The strength of negotiation is communicating to maximize benefits for both parties; one party may "win," but a negotiated agreement might actually be more advantageous for both.

In *Getting to Yes*, Roger Fisher and William Ury establish three goals for any successful negotiation:

1. to produce a wise agreement,
2. to be efficient, and
3. to improve or at least not damage the relationship between the parties.[4]

[4] R Fisher & W Ury, *Getting to Yes: Negotiating Without Giving In* (New York: Penguin, 1981) at 4.

PRINCIPLED NEGOTIATION

Getting to Yes: Negotiating Agreement Without Giving In is a book that was written in 1981 by Roger Fisher and William Ury. The book is based on the work of the Harvard Negotiation Project—Fisher and Ury were members—a group that focuses on conflict resolution and negotiation. The program was initiated in 1979 with Fisher and Ury serving as co-heads of the project. The book is a best-selling, non-fiction book that focuses on the psychology of negotiation through their method of "principled negotiation" and non-adversarial bargaining. In the book, their step-by-step guide offered a strategy for reaching win–win agreements in a variety of conflicts. The book was widely adopted by students, businesses, and negotiators around the world as a leading guide to negotiation techniques. The book is not without criticism due to its lack of scholarly or analytical evidence. However, since its publication more than 40 years ago, it is known as the best-selling book in negotiations.

Source: J White, "Essay Review: The Pros and Cons of 'Getting to YES'" (1984) 34 J Leg Educ 115.

Goal 1: Wise Agreement The first goal is to ensure the agreement is *wise*. When one or both parties make demands right from the beginning of the negotiation, both sides become personally committed to their positions and unwilling to move from them. They defend their positions unnecessarily, the emotions of the parties escalate, and their egos prevent them from assessing the issues. They become defensive and feel they need to "save face" despite the issues at hand. In short, the negotiation becomes counterproductive. A wise agreement is reached once the parties have explored one another's interests, and the agreement reflects those interests and not just one party's position. This can be difficult to achieve if a party locks into a certain position or becomes defensive. In these situations, it is easy for a conflict to escalate and for the parties to lose sight of their interests.

Goal 2: Be Efficient The second goal of a successful negotiation is to be *efficient*. Large amounts of time can be wasted during a negotiation as the parties haggle back and forth trying to find common ground. This inefficiency of the bargaining process can exhaust resources as it becomes more costly to both the budget and the physical well-being of the parties. Consider a union and employer negotiation wherein both parties have taken extreme positions and refuse to consider opposing offers. The dispute escalates, and no progress is made, impacting both the employer who is unable to have normal operations and employees who have a reduced income.

Goal 3: Maintain the Relationship The third and final goal of a successful negotiation is to improve—or at least not further damage—the *relationship*. When parties haggle over positions, the parties' relationship may suffer as one party feels they have lost at the expense of the other's win. Consider neighbours who may have a dispute over noise or the inappropriate use of property. Any unsuccessful negotiation may have long-term consequences on a relationship that requires neighbours to live next to each other for another 20 years or so. Another example might be employees and employers that may need to continue working together in the future.

What exactly does a successful negotiation mean to the legal representative negotiating on a client's behalf? Social scientists and analysts continue to study correlations

and factors between phases and stages of a negotiation that ultimately lead to a successful outcome. Unfortunately, the diversity of factors in a negotiation makes it impossible to impose a rigid model on any one negotiation, as any number of factors may change the dynamics of a negotiation and the likelihood of a successful outcome. What is agreed, however, is that there are advantages and disadvantages to each of these different styles, strategies, behaviours, and theories of negotiation. A thorough understanding of these concepts will allow you to objectively assess how best to proceed in any negotiation.

Types of Negotiation Theories

There are two primary models of negotiation that are used in most legal actions:

1. Positional negotiation
2. Principled negotiation

Positional Negotiation

The traditional method of negotiation involves each side taking a particular position, arguing about it back and forth, and making concessions until an agreement is reached. This is widely acknowledged as a type of **positional negotiation**, in which both sides take on successive positions only to give up those positions in order to achieve agreement. Consider a typical positional negotiation in a used car lot: the dealer who tries to sell a used car to a buyer. The dealer starts high with a price of $8,000, knowing that they will have to move lower, and the buyer offers a lowball price of $4,000, knowing that they will end up somewhere higher than that. Both concede at different points, going back and forth, hoping to end up somewhere in the middle at around $6,000.

positional negotiation a type of negotiation in which both sides take on successive positions only to give up a sequence of positions to achieve agreement that may or may not ultimately be reached

This style of negotiation can be useful; as the dealer and buyer communicate what they want, each party can focus on a particular number that is suitable, and the dealer and buyer might eventually end up agreeing somewhere in the middle. However, Fisher and Ury suggest that negotiating based purely on positions is inefficient and unwise, and endangers ongoing relationships as negotiators lock themselves into certain positions.

First is the concern that arguing over positions produces unwise agreements. By taking on a position, negotiators unknowingly begin to lock themselves in. As one party defends its position and attacks the other, an emotional attachment develops, and the party further commits to that position. The position becomes inextricably linked with the ego of that party. The goal becomes less about meeting both parties' original interests and more about keeping one party's position at all costs to "win" the negotiation and "save face." Agreement is less likely as more time and attention is spent defending that position instead of considering the parties' actual needs and interests.

The second concern about positional negotiation is that it is inefficient. It is easy to see that a positional negotiation involving defending and attacking, bargaining back and forth, and making an emotional investment in the process takes a lot of time. When parties enter a negotiation with an extreme position, they concede little because their goal is to keep as close to their positions as possible. To do so, parties may apply

disclosing all of the facts, applying pressure through personal attacks and threats, and causing unreasonable delays. In addition, each small concession means that parties must decide what to offer, what to reject, and whether to give in. Parties expect that when one side concedes one thing, the other will have to concede something as well. Thus, the parties deliberately stall and drag things out to reduce the number of concessions they may have to make. All of this becomes time consuming and costly, and risks the success of the agreement.

The third concern is about the impact on the future relationships of the parties. Positional negotiation is akin to a battle of wills between the parties; if the winner is the party who is the most powerful, that means that the other party must lose. The loser may develop feelings of bitterness, anger, and resentment toward the winner. These hard feelings can destroy ongoing relationships.

Principled Negotiation

principled negotiation
a method of negotiating on the merits designed to produce "wise outcomes, efficiently and amicably"

interests
the underlying needs, concerns, desires, and fears of a party

At the Harvard Negotiation Project, Fisher and Ury developed an alternative to positional bargaining called **principled negotiation**, which is a method of negotiating on the merits that is designed to produce "wise outcomes, efficiently and amicably."[5] The authors argue that the basic problem in negotiation "lies not in conflicting positions, but in the conflict between each side's needs, desires, concerns, and fears."[6] These desires and concerns are the underlying **interests** that motivate people. While opposing parties may have some conflicting interests, they also have shared and compatible ones. Talking about interests, acknowledging interests, and being open to new ideas will encourage parties to invent possible options that allow them to gain mutually from an agreement. The goal of principled negotiation is to reach an agreement that is fair and mutually acceptable to the parties.

Certainly, there have been critiques about the benefits of the process of seeking shared interests as compared with a positional negotiation. A major criticism stems from the difficulty of discussing interests with the other party. Some individuals may try to avoid conflict at all costs. Their approach of withdrawal and avoidance can make it difficult to exchange interests. Other individuals ignore their own interests as a means of trying to please others. These accommodators have a great concern for relationships. Unfortunately, they leave the negotiation unsatisfied as their interests are not met. However, through the careful use of the methods developed by Fisher and Ury, negotiators may be able to encourage parties to creatively explore their interests.

Fisher and Ury's method of principled negotiation is set out in four major steps:

1. Separate the people from the problem.
2. Focus on the parties' interests and not their positions.
3. Invent options to solve the problem.
4. Use objective criteria to evaluate the options.

5 *Ibid* at 10.

6 *Ibid* at 40.

Step 1: Separating the People from the Problem

When parties enter into a negotiation, their emotions are often linked closely to the problem at hand. In most cases, the parties have a personal relationship and a history of some kind with each other. Thus, they often enter a negotiation with certain perceptions, whether real or perceived, that can be difficult to shake and can cloud the entire negotiation. Those perceptions may come from a variety of sources, including different backgrounds, values, emotions, and viewpoints.

SHARING STORIES

The final national event of the Truth and Reconciliation Commission of Canada focused its conversations on reconciliation.

Consider the Truth and Reconciliation Commissions in South Africa and Canada. The commissions allowed participants to recognize and share their feelings and stories, and obtain an apology from the government. In South Africa, the Truth and Reconciliation Commission was established as a court-like restorative justice process. Victims, witnesses, and perpetrators of violence gave testimony of crimes relating to human rights violations during apartheid. The commission offered known perpetrators of abuse the possibility of amnesty in exchange for testimony about suffering and abuse committed by the apartheid government. The mandate of the commission was not only to bear witness and record the crimes but also to provide reparation and rehabilitation through reconciliation. This mandate was in sharp contrast to a more retributive style of justice used in other war crimes trials to punish the perpetrators. Part of the commission's outcome resulted in a formal apology by the government. The long-term positive effects of the commission were significant in both the political and economic environment in South Africa. This successful approach was later instituted by a number of other countries, including Canada.

The Truth and Reconciliation Commission of Canada was established in 2008 to reconcile the treatment of First Nations children sent to residential schools. The residential school legacy system operated from 1870 to 1996 for the purpose of separating First Nations children from their families and resulted in abuse and other ill effects. The commission led to a formal apology by former Prime Minister Stephen Harper for the role of past governments in the administration of the residential schools

In most cases, parties to a negotiation should have an interest in trying not just to satisfy their interests but also to preserve future personal relationships, as they will likely encounter each other in some way in the future. Recall the example of neighbours who may continue to live next to each other; business partners too may continue to be involved in the same business or within the same network, and employees may continue working for their employers. Even when it is unlikely that the parties to a negotiation will have future interactions, it is still important to preserve the ongoing relationships between the parties, their representatives, and opposing representatives. The legal community is very small and there are many possible future interations that may take place (e.g., legal representatives will continue to have many future engagements with their opposing legal representatives).

Legal representatives must understand that parties are often so focused on winning that they do not consider the damage that a conflict can cause to an ongoing relationship. It is their responsibility to help their clients see the long-term consequences for their relationships. First and foremost, it is their duty to act in the best interest of their clients, as their agent, and in accordance with any applicable rules of conduct or codes of ethics. Second, when the negotiation goes in the wrong direction, clients may seek to attribute blame toward their agent in the negotiation—you as the legal representative.

So how do we separate the people from the problem? By untangling that relationship from the problem at hand and dealing with the people problems separately from the problems under negotiation. That may mean correcting any inaccurate perceptions by educating the parties, releasing any strong and negative emotions by allowing the parties to let off steam, and clarifying any misunderstandings through improved communication, and sometimes even physically separating the parties in different rooms to reduce any emotional reactions or outbursts. In some instances, encouraging the parties to apologize, can eliminate the emotional frustration that some experience. Of course, that tactic should only be used in situations when concerns such as the admission of liability is not an issue.

SEPARATING THE PEOPLE FROM THE PROBLEM

Help your clients improve their communication and deal with inaccurate perceptions and emotions by counselling them using the following principles.

Perceptions

- Put yourself in their shoes. Pick out facts that confirm their perceptions, and understand that seeing their point of view is not the same as agreeing with it.
- Do not assume certain intentions. People often tend to assume the worst interpretation of what the other side says or does.
- Do not blame someone else for your problems. Even if blaming is justified, it is usually counterproductive. People tend to feel attacked, become defensive, and resist what you may have to say. Discuss each other's perceptions by discussing the facts in a frank and honest manner without blaming each other.
- Look for opportunities to act inconsistently with their perceptions by sending a message that is different (and more positive) than what they expect.
- Give them a stake in the outcome by making sure that they participate in the process. Agreement is much easier if both parties feel ownership of the ideas by collaborating and brainstorming options.
- Make proposals that are consistent with their values and allow the opposing party to "save face" by giving them an easy way out. This might mean phrasing a solution differently so that it seems to be a fair outcome.

Emotions

- Recognize and understand that emotions on one side will generate emotions on the other.
- Make emotions explicit and acknowledge them as legitimate by listening quietly without responding to their attacks.
- Allow the other side to let off steam. Some people need to vent or complain before they can tackle the problem. Letting off steam may make it easier to talk rationally later on.
- Use a symbolic gesture such as an apology to defuse emotions effectively. Some people just want to be heard and to have their emotions acknowledged as real.

Communication

- Active listening will help the parties listen to what is being said by the opposing party and understand their interests.
- Talk to the other side instead of debating with them.
- Describe the problem in terms of its impact on you instead of what they have or have not done. Use "I" statements such as "I feel" instead of "you" statements such as "You did this."
- Self-monitor what you are saying and the impact it might have on the opposing party.
- Show understanding by trying to restate what the other party is saying with phrases such as "To be clear, are you ...."

Step 2: Focusing on Interests Instead of Positions

While people may take certain positions based on their interests, it is ultimately their focus on that goal that may inhibit and shield them from truly satisfying those interests. Deciding on a position may stifle any creativity in finding a solution—the party may be less likely to find mutual ground between both parties and their relationship

can suffer. Instead, if the parties determine what both sides' interests are, they might better define the problem, satisfy their true desires and concerns, and find compatible interests as well as conflicting ones.

IDENTIFYING INTERESTS

It is essential to realize that each side has not just one interest, but multiple interests. As discussed in Chapter 3, "Theoretical Approaches to Understanding Conflict," the most powerful interests are the basic human needs that motivate all people: security, economic well-being, a sense of belonging, recognition, and control over one's life. Money is usually not the only interest and priority for groups and individuals.

To help identify the other party's interests, it often helps to put yourself in the other's shoes. Parties should examine each position and then consider why the other party might hold that position. This helps them to consider the other party's needs, hopes, fears, and desires. Ahead of the negotiation, it may help to construct a chart that shows what the other side may stand to lose or gain. By asking "why" and "why not," you can begin to consider what interests stand in the opposing party's way. You can then analyze consequences as the other side may see them, such as the impact on their peers and constituents, whether the agreement will set a precedent, whether the agreement will have economic consequences or consequences for public opinions, and whether the agreement goes against their principles/values.

Making a list is the easiest way to identify interests as it helps sort and assess interests by prioritizing them as more important and less important. The list may help create new information by stimulating ideas, and finally, identify the people who may be affected by the outcome.

COMMUNICATING INTERESTS

Being able to communicate your interests is as important as knowing the other side's interests. If you want the other side to understand your interests, you will have to explain and communicate them. Make them come alive by being specific and using concrete details that will add credibility. This will help to legitimize your interests by allowing the other side to empathize.

To start, it often helps to put the problem before the answer so that the other side can listen to your interests rather than concentrate on a response or rebuttal. This involves giving your interests and reasoning first and your conclusions and proposal later. Keep the direction of the communication focused on the future—look forward, not back. Consider, for example, a community dispute that is being negotiated between residential owners and their city councillor. The residents are anxious to put speed bumps on their street as a traffic-calming measure. The councillor is known to be reluctant to use this method, believing that other methods are more effective. In approaching the negotiation, the residents should first discuss the safety concerns of the neighbourhood and recognize how the councillor is concerned about the safety of his constituents prior to a discussion of any options, particularly the proposal of speed bumps. This allows both parties to focus on each other's interests and to approach the matter as problem-solvers.

It is important not to be concerned with only your own interests. By acknowledging and understanding the other party's interests as part of the problem to be solved, the other party may be more willing to listen to your interests. It may help to write down both sides' interests as you learn them.

Also, be open to reconsidering your interests and options based on what you have learned from the other side. During this process, remain open-minded and expand the options that might meet your interests. This will ultimately satisfy Fisher and Ury's objective of principled negotiation to be "hard on the problem" and "soft on the people," meaning that you should be hard in talking about your interests and soft on the people by avoiding personal attacks and showing respect, concern, and empathy for the person.[7]

Step 3: Inventing Options to Help Solve the Problem

A common mistake in positional negotiation is setting up a negotiation based on what a party either wants or would settle for. This sets out an arbitrary range for haggling—people try to narrow the gap between their positions, focusing on maximizing their own benefits, instead of expanding their options by considering other solutions that keep both parties' interests in mind. This assumption is commonly referred to as a "**fixed pie**" or "fixed sum," and it leaves the parties stuck to only one option or outcome and unprepared to engage in real problem-solving with each other.

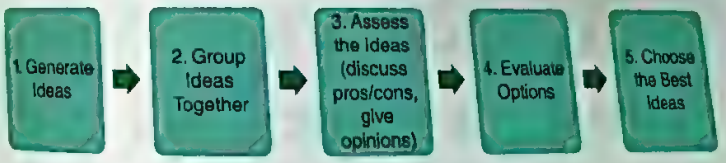
fixed pie
the assumption by a negotiator that the resources and options are fixed

It is possible that the development of too many options can delay settlement and confuse the issues. However, by "**expanding the pie**" and generating more options, there is a greater chance that one of those options may reconcile the differing interests of the parties. The key is to expand the pie before dividing it by inventing solutions that may be advantageous to both sides. That means inventing the options first and deciding on the solution later, as described in the "Options-Generating Checklist" box below.

expanding the pie
attempt by the negotiator to consider options and resources outside of the party's position

First, brainstorm to come up with a list of possible solutions. Be sure to postpone all criticism and evaluation of ideas until after the brainstorming. Ultimately, those ideas will help stimulate more ideas, so any premature judgment may hinder imagination. Consider brainstorming before entering the negotiation with the other side. Recognize that not only does brainstorming generate ideas and options, it also shows the client's willingness to be open and flexible. Once at the negotiation, brainstorming with the other side may help come up with options that meet everyone's interests. Brainstorming also has the advantage of revealing more about the opposing party's limits. When brainstorming, try to seek out options of different strengths and priorities. One strategy may be to invent several options you like and ask the other side to choose one.

HOW TO BRAINSTORM EFFECTIVELY



Rules to Keep in Mind when Brainstorming

- Use brainstorming during the exploration stage of the negotiation.
- Generate as many ideas as possible.

7 Ibid at 9.

- Do not limit your ideas.
- Remember, no idea is a bad idea, as one idea generates other ideas.
- Do not assess options beforehand. Ask the parties to put off making any judgments.
- Try visual brainstorming. Use a whiteboard or cover the wall with Post-it notes. It becomes easier to keep track of the ideas and organize them later on.
- Assess the options only after brainstorming is over.

After brainstorming, look for common ground and interests between parties and focus on ways to satisfy those interests, what Fisher and Ury describe as "mutual gains."[8] Finally, identify the best options and come up with ways to improve on those ideas. Such a strategy may lead to a new and beneficial solution to the problem.

OPTIONS-GENERATING CHECKLIST

- ☑ Brainstorm to generate a variety of options.
- ☑ Try to establish creative options.
- ☑ Do not reject options until later, and focus on ideas.
- ☑ Evaluate options. Look for win–win options by focusing on interests.

Step 4: Using Objective Criteria to Evaluate the Options

objective criteria fair standards and fair procedures external to the negotiation that can help the parties assess the reasonableness of the options they generate

The fourth and final cornerstone of Fisher and Ury's principled negotiation is to use **objective criteria** to evaluate the options. Objective criteria are factual pieces of information that are independent of the will of the opposing parties. At this stage of the negotiation, often the parties may need to turn the negotiation into a rational one, and base their assessment of the options on true or known facts. Unfortunately, the parties might have exaggerated or lied about their positions and interests and there may be a concern about trust. How are the parties able to verify which statements are true and accurate? Would you ever rely on a used car salesperson's statement that "this is a really great car"? No. You would ensure that you have checked the mileage, the year and make of the vehicle, the registered accident history of the vehicle, and even taken it to an independent mechanic to verify the condition of the vehicle. These are all forms of objective criteria. Those criteria are facts that are independent of the opposing party and outside of their control. To avoid the battle of wills that usually accompanies positional negotiations, the parties should negotiate in a way that is independent of the will of the other side by using objective criteria. Using objective criteria means relying on the use of fair standards and procedures throughout the negotiation. Fair standards must be independent of the will of either side and must also be practical. They include the following:

- market value,
- precedents,
- scientific judgments,
- professional standards,
- costs,
- court decisions,
- moral standards,
- expert opinion, and
- tradition.

Objective criteria is an important part of a party's due diligence when assessing options presented by the opposing party. It can provide the party with more confidence and support of options presented in a negotiation. The parties are able to justify the options by relying on objective facts. They will appear more firm, confident and well prepared during the negotiation. It is important to remember that having the objective criteria is not enough as the parties will need to think about how to use and present that factual information in persuading the other side. Another way to perceive objective criteria is as "proof" or "evidence." A legal representative would never argue a case without supporting evidence. Precedents, such as case law, are used by legal representatives to demonstrate that similar fact cases should be treated the same. Case law is considered as objective since their outcomes have nothing to do with the case at hand. The more independent the evidence is, the more reliable it becomes.

In some instances where the parties are unable to decide on a fair option, the parties might instead agree on a fair procedure. This is effective when there are still too many question marks about who is at fault in the conflict. For example, consider a dispute between a vehicle mechanic repair shop and a customer. Following the repair, the vehicle continued to show some other problems. The repair shop feels it made the repairs asked of them and that any subsequent issues are new and not the fault of the repair shop. It could be a manufacturer defect. Therefore, at this stage it is difficult for the mechanic shop to admit liability to the repair that was done. Since the parties are not able to agree on a solution that relied on the fault of the other party, the parties might instead agree on a fair process. That fair process means obtaining an expert opinion and quote by two other mechanic shops and agreeing to fault based on that. Fair procedures may be key to moving the negotiation along and producing a wise agreement. The objective is to establish a fair procedure that both parties will follow. This usually requires parties to seek more reasonable solutions based on the fair procedure that must be followed. You may want to insist on having someone else, such as a mediator or arbitrator, play a key role in the decision-making process. Another option is to have a procedure within which the parties can submit issues in question to an expert.

8 Fisher et al.

USING OBJECTIVE CRITERIA EFFECTIVELY

Consider a fact scenario between a senior legal representative, Louise, and a newly licenced paralegal, Parampreet. The paralegal Parampreet is representing a plaintiff that was injured while walking on the defendant's business premises. The senior legal representative Louise has contacted Parampreet and attempted to negotiate a quick resolution to the dispute. Louise has already sent aggressive emails suggesting that the Plaintiff's Claim filed by Parampreet is likely to be dismissed. She alleges that the claims and client injuries have been exaggerated and that Parampreet could risk being charged by the Law Society of Ontario for misconduct due to misrepresentation. In addition, Louise has provided Parampreet with a copy of a doctor's report regarding the plaintiff's alleged injuries. Parampreet responds by relying on objective criteria. Parampreet advised Louise that she had already hired an independent doctor to assess her client's injuries. Parampreet refers to the weather including ice and snow buildup on the day of the incident. Parampreet also refers to caselaw and legislation that supports the property owner's obligations about keeping the property safe, refers to the timelines for small claims court matters, and requests that the parties mediate the matter.

Fair procedures are effective not only against the other party but also for the relationship with the client and legal representative. When you have a stubborn client who refuses to consider interests or options, a fair procedure that incorporates an unbiased third party will put pressure on both parties to make their proposals more reasonable.

To negotiate with objective criteria, Fisher and Ury set out three basic points:

1. *Frame each issue as a joint search for objective criteria.* The parties may have conflicting interests; however, they have some shared goals such as determining a fair outcome. Therefore, agree on the standards that are going to apply before discussing any possible terms or solutions. If the other party begins by giving a position, ask what the supporting theory is—for example, what has been considered to arrive at that price.
2. *Reason and be open to reason.* While it is important to insist on using objective criteria, remember that one fair standard should not preclude other ones from applying. The parties should offer their own principles and fair standards, but they should not insist on an agreement based on solely those advanced by one party.
3. *Never yield to pressure, only to principle.* There are tremendous benefits to using objective criteria in a negotiation. First, it helps parties from yielding to various pressure tactics from the other party, such as bribes, threats, manipulation, and so on. Second, by insisting on objective criteria, the other party will have more difficulty resisting objective standards. Finally, by applying this wise strategy of principled negotiation, you can expose the poor logic of the opposing party.

What does principled negotiation mean—practically speaking—for you as a legal representative? As we will discuss in Chapter 6, "Preparing to Negotiate on a Client's Behalf," much of the focus will be on evaluating, understanding, and seeking out the underlying interests of both your client and the other party. Specifically, those underlying interests would include each side's basic human needs, desires, concerns, and fears. As for inventing options for mutual gain, you can assist the parties in broadening their options by brainstorming to help identify their shared and different interests. Finally, to reconcile areas of conflict, you should seek to negotiate using objective criteria such as fair standards and procedures.

Style of Negotiation

Competitive, Cooperative, or Problem-Solving

Negotiators tend to choose between two negotiating styles: being the hard negotiator who is aggressive and competitive, concedes little, and makes high demands, or being a soft negotiator who is cooperative and generous, and makes too many concessions. Both styles of negotiating have been criticized for their lack of effectiveness in a negotiation; as GR Williams points out from his study of the patterns of negotiation, "neither approach can claim a monopoly on effectiveness."[9] Extensive studies of distinct approaches to negotiation continue to seek out characteristics of effective and ineffective negotiators.

The disadvantages of each of the two styles of negotiation are quite clear. With an aggressive negotiator as agent, the client risks much, as there are fewer settlements, more misunderstandings due to tensions and lack of trust, lower joint outcomes, and possible retaliation from the other party.[10] The cooperative negotiator risks being exploited and giving in too easily.

How can you be the most effective negotiator for your client? The challenge is that a negotiator's style is often determined by their personality—and your biologically hardwired personality is not that easy to change. However, being more strategic in the selection and implementation of a negotiating style will lead to more effective negotiation. It is critical to identify your own style and understand its limits and strengths. Completing the Conflict Resolution Style Questionnaire in Chapter 2, "Understanding Conflict," will help you recognize your natural tendencies to use a dominant style for negotiating a conflict. People can change the way they negotiate based on making a conscious choice as to which style is most effective for them in a negotiation. You should take the time to consider your opponent's style as well so that you will be able to respond and adapt your own style during the negotiation.

Legal representatives who are ethical and use common sense can be effective negotiators despite having a particular negotiation style. Through extensive research, Andrea Kupfer Schneider sought to shatter the myths about the effectiveness of negotiating styles. Her research led her to conclude that lawyers who are pleasant, courageous, astute, and well prepared do well in negotiations. They are able to maximize their problem-solving skills, balance assertiveness and empathy, and be more effective on behalf of their clients. They are able to expand the pie by generating more solution options through creativity and flexibility and understand the other side with listening

9 GR Williams, "Style and Effectiveness in Negotiation" in JC Kleefeld et al, Dispute Resolution: Readings and Case Studies, 4th ed (Toronto: Emond, 2016) at 182.

and perceptiveness. They set the standard to which other advocates should aspire. Schneider's research can provide important insight for other legal professionals as they negotiate. A list of some of these identifiable negotiation skills include the following:

- ethical conduct,
- honesty,
- excellent advocacy and communication skills,
- a persuasive manner,
- a realistic and objective approach,
- a solid understanding of the industry, and
- meticulous preparation.

As a legal representative, by aspiring to these same standards and exhibiting these identifiable skills, you may be a more effective negotiator. However, it is important to remember that your negotiating style will also depend on the situation, such as your client's relationship with the other party, as well as the goals of the negotiation in the long or short term. Be cautious to ensure you share the same objectives and goals of the negotiation as your client. In particular, winning at all costs or playing hardball with parties who have an ongoing relationship may ultimately interfere with the negotiation. Settlement does not automatically translate into effective negotiation.

When in a negotiation, you must be aware of the behavioural phenomena of negotiations. While much literature and studies focus on the actual practical skills that may be applied to an effective negotiation, some authors have studied personal behaviour traits as an enhancement of negotiation effectiveness. Roger Fisher and Wayne Davis have set out six interpersonal communication traits they believe improve negotiations.[12] Exploring each of these skills closely gives you a clear understanding of how each of these traits may be applied. Fisher and Davis encourage negotiators who wish to develop a strong, well-balanced repertoire to use the following checklist as a succinct and effective guide to the enhancement of negotiation.

1. *Express strong feelings appropriately.* A skilled negotiator should be able to express emotions appropriately by accepting and being aware of both parties' emotions, yet at the same time understand the substantive issue being discussed.
2. *Remain rational in the face of strong feelings.* In the face of another party's strong emotions, there are several ways to react effectively. They include acknowledging the other party's feelings and, in some cases, encouraging them to express those feelings fully and completely; briefly withdrawing from the discussion to allow others to regain composure; separating the causes of those feelings from the substantive problem; and determining at the outset of the negotiation if the emotional reaction is purposeful to the meeting.
3. *Be assertive within a negotiation without damaging the relationship.* Learn to deal with differences and disagreements appropriately by avoiding personal judgments, understanding the purpose and goal of the session, and remaining firm on your position while at the same time being open to alternative views and ideas..
4. *Improve a relationship without damage to a particular negotiation.* This fourth skill acknowledges the value of relationship-building as favourable to reaching an outcome. Simple steps would include recognizing the merit in something another party has done, and the realization by both parties of their dependence on each other to reach a desirable goal.
5. *Speak clearly in ways that promote listening.* The fifth skill concentrates on ways to promote listening by both parties by speaking only for yourself, using short, clear statements, and avoiding making assumptions about their thoughts, feelings, and motives.
6. *Inquire and listen effectively.* The sixth and final skill promotes active listening and inquiring by making sure you have understood the other party's full argument. This can be achieved through simple techniques such as allocating a specific time to listen to the other party, not responding until the entire argument is stated, and repeating back the argument for a full understanding of the reasoning.

The Bargaining Process: Value Claiming and Value Creation

It is no surprise that the very essence of a negotiation requires some degree of both competition and cooperation. Negotiators, while seeking to advance their client's own interests, must do so by cooperating with their opponent. As a legal representative, it is essential that you have a sound understanding of the various theories regarding the fundamental nature of negotiation and also its controversies.

David Lax and James Sebenius explain that while this conflict exists, competition and cooperation cannot in practice be separated and are inextricably linked.[13] While the cooperative moves to create value by increasing the benefits available to the parties, the competitive tries to claim it. Lax and Sebenius coined the terms **value creators** and **value claimers** to explain this fundamental tension and its impact on negotiation. In fact, it is this tension created by the value creators and value claimers that characterizes what Lax and Sebenius refer to as the negotiator's dilemma. The dilemma occurs this way: When both opposing negotiators create value, the result is good. When both negotiating opponents claim value, the result will only be mediocre. When one negotiator creates and the other claims, however, the result will be bad for the value creator but excellent for the value claimer.

value creators
parties to a negotiation who seek to increase the available benefits

value claimers
parties to a negotiation view the available bene fixed pie and seek to cl most benefits for them

Lax and Sebenius recognize that value creators are believers of using cooperation and creativity to achieve a successful negotiated agreement where both parties have gained. A **win–win negotiation** is made possible by negotiators communicating and sharing information to jointly create value. By further exploring and cultivating shared interests, the pie is expanded and value is created by finding *joint* gains.

win–win negotiat
a negotiated agreem that is beneficial to parties in the negot

11 AK Schneider, "Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style" in Kleefeld et al, *supra* note 9 at 192.

12 R Fisher & WH Davis, "Six Basic Interpersonal Skills for a Negotiator's Repertoire" in Wiggins & Lowry, *supra* note

On the contrary, value claimers are believers of using tough, hard negotiating to get as much of the pie as possible by taking it from the other party. This means winning at negotiating by concealing information, exaggerating a position, and not accepting anything less than a favourable agreement to the point where the other party must lose. If, as the negotiator's dilemma demonstrates, parties do better when they create value, then seeking out a win–win negotiation is an important choice for negotiators at the outset of the process. Negotiators jointly create value by understanding each other's underlying interests in the negotiation instead of focusing on each other's very narrow positions.

Negotiation Case Study

Mary felt bad about the situation and the way her husband reacted. While Leo was away on a business trip, she invited Angela to join her for dinner so that the two of them could discuss the matter.

Angela agreed to have dinner with Mary and the two of them engaged in pleasant small talk throughout the meal. When it was time to discuss the damage to Angela's belongings, Angela informed Mary that it is the landlord's responsibility to pay for damages to personal property of the tenants if there is a burst pipe. She went on to explain that a friend has advised her to go to small claims court in order to get compensation for everything that was ruined.

Mary was surprised at Angela's suggestion of going to court. Mary clarified that the pipe had not actually burst—it was just a leak. She also suggested that Angela could have been responsible for the leak. Regardless, as a gesture of good faith, Mary decided to increase the original offer from $60 to $100. She was not sure if Leo would be agreeable to paying the extra amount—he was already upset that they would have to pay to repair the pipe and the damage to the closet.

Angela was offended by the accusation and the low offer. She started to cry and mumbled that they owe her the full amount of the damage, $1,000. As Angela walked away from the table, she muttered "I guess I have no other choice … I will see you in court."

Mary responded by saying, "Go right ahead. That's the problem with you kids today … always trying to get something for free. I'm tired of you asking for every little thing to be fixed! You don't know how good you have it living here."

Discussion of Scenario

- *Emotions*: Angela started crying during her discussion with Mary. Showing legitimate emotion is acceptable as it can demonstrate how strongly a party feels about the situation. As well, sometimes parties first need to let out their emotions before then can proceed with the negotiation. Legal professionals need to recognize that emotions can have an impact on the negotiations and can trigger an emotional response from the other party.
- *Goals of Negotiation*: According to *Getting to Yes, Negotiating Without Giving*,[14] there are three goals of negotiation: to produce a wise agreement; to be efficient; to improve or at least not damage the relationship between the parties. In this scenario, the use of positional negotiation did not lead to an agreement, it was not efficient and it seems to have caused further damage to the relationship.
- *Separate the People from the Problem*: Both parties should have put themselves in the other person's shoes and not made any assumptions or accusations. Mary intertwined the people with the problem when she commented on Angela's age and the fact that she asks for every little thing to be fixed.
- *Focus on Interests and Not Positions*: The parties only discussed the matter on a positional level. They discussed the amounts for possible settlement, but did not take the time to discuss the underlying interests. A discussion of interests could have led to more ways to resolve the issue.
- *Generate Options*: Angela seemed to think that the only option was to take the matter to court. Neither Mary or Angela took the time to brainstorm other options.

14 Fisher & Ury, *supra* note 4

CHAPTER SUMMARY

Legal representatives have the difficult job of leading their client down the "negotiation path" by carefully preparing, discussing, and ultimately negotiating on their behalf. There are many barriers to negotiation, such as poor communication, negative emotions, and extreme restricted thinking, which reduce the likelihood of coming to a wise agreement. In particular, extreme positions draw out negotiations, thus raising costs and jeopardizing relationships. Many theories and studies attempt to predict the impact of particular behaviours and strategies on the outcome of negotiation. However, it is important to remember a common theme in the literature that may guide you to a successful experience: careful planning with clear objectives will improve negotiation outcomes.

KEY TERMS

advocate, **105**
expanding the pie, **115**
fixed pie, **115**
interests, **110**
negotiation, **105**
objective criteria, **116**
positional negotiation, **109**
principled negotiation, **110**
value claimers, **121**
value creators, **121**
win–win negotiation, **121**

REVIEW QUESTIONS

1. List three barriers to negotiation and describe how each acts as a barrier and the impact each has on a negotiation.
2. Compare and contrast the differences between hard negotiating style and soft negotiating style.
3. Which of the following describes principled negotiation?
   a. Each side takes a position, argues for it, and makes concessions to reach a compromise.
   b. One side gives in to the demands of the other.
   c. Each side takes an extreme position.
   d. It produces an agreement in favour of the stronger party.
   e. It produces a wise outcome, amicably and efficiently.
4. In order to determine a fair selling price for a house, what could be considered objective criteria?
   a. The amount the seller wants to get for it.
   b. The amount the buyer is willing to pay.
   c. A compromise split exactly in the middle of what the buyer and seller want.
   d. Market value.
   e. The reasons why the seller has suggested that price.
5. Which of the following standards are objective criteria?
   a. Your personal standards.
   b. The standards of the opposing party.
   c. Independent standards.
   d. Your client's standards.
   e. None of the above.
6. What does it mean to insist on using objective criteria in a negotiation? What can be achieved by doing so? List five fair standards that are forms of objective criteria.
7. Explain the negotiator's dilemma and how it relates to value creating and value claiming in a negotiation.

DISCUSSION QUESTIONS

1. Beth is employed with Garden Depot. She has been working with the company for many years. While she did have a few mediocre performance reviews when she first started, she has now had several years of good reviews. Her supervisors have been encouraging and supportive. Beth really likes the gardening field and would like to pursue a career in it. She hopes to go to night school to improve her marks so that she can apply to the local college. She would need to revise her work schedule slightly from a regular 9 a.m. to 5 p.m. workweek and instead move to a 7 a.m. to 3 p.m. schedule. Beth is planning to meet with her supervisor to discuss this possibility and negotiate a solution.
   a. List four of Beth's interests.
   b. List four of Garden Depot's interests.

Preparing to Negotiate on a Client's Behalf

6

Learning Outcomes

After reading this chapter, you will be able to:

- Understand how to best prepare for the negotiation with your client.
- Assist clients in identifying their issues, defining their interests, and develop a target point.
- Help the client determine their best and worst alternatives, or BATNA and WATNA.
- Review the strengths and weaknesses of the client's case and advise them accordingly.
- Understand the terms of a settlement agreement and learn how to draft one.
- Apply the concepts from this chapter to a recurring conflict case scenario.

Introduction

No matter what book you consult about negotiation strategies, the leading and most significant component of the negotiation is preparation. In his book Getting Past No, William Ury emphasized this by titling one of the chapters, "Prepare, Prepare, Prepare." He attributed the secret of effective negotiation to this very act.

> Most negotiations are won or lost even before the talking begins, depending on the quality of the preparation. People who think they can "wing it" without preparing often find themselves sadly mistaken. Even if they reach agreement, they may miss opportunities for joint gain they might well have come across in preparing. There is no substitute for effective preparation. The more difficult the negotiation, the more intensive your preparation needs to be.[1]

While we may not be able to control the outcome of a dispute and the negotiation, we can control our effort and preparedness.

Preparation—What Happens Before You Negotiate?

While many authors and theorists offer a variety of checklists for effective preparation, the lists share many essential ingredients. For the legal representative, preparation will include not only an examination of the generally accepted stages of good preparation but also a rehearsal of the negotiation session. These stages can be set out as follows.

1. Preparing the client for the negotiation.
2. Developing the client's interests.
3. Developing a target point.
4. Determining the client's alternatives.
5. Understanding the opposing party's interests.
6. Reviewing the strengths and weaknesses of the client's case.
7. Rehearsing the negotiation.
8. Drafting a settlement agreement.
9. Other considerations when preparing: The ethics of negotiating.

Stage 1: Preparing Your Client for the Negotiation

As the legal representative, preparation will be an essential part of your negotiation process. In some cases, your client will be relying on you to assist in a critical analysis of their interests at this stage of the process. In other cases, however, your client may not realize the importance of preparing and may view it merely as an added cost of the negotiation. It is therefore up to you to insist on attributing some time to this stage and to ensure that your client understands why preparation is necessary. Adequate preparation will benefit your client in a number of ways:

- aiding in a successful negotiation,
- helping your client feel more at ease with the process,
- developing a rapport,
- giving your client realistic expectations, and
- preparing your client for different outcomes and possibilities.

You also will benefit from the preparation by reducing the possibility of "surprises," such as emotional outbursts or unknown facts that may suddenly arise.

The first step in this part of the process is establishing the time for preparation prior to the negotiation. For many busy clients, preparation will be low on the priority list—meetings, phone calls, and emails may seem more urgent. You must insist on completing this stage and plan for it in much the same way as the negotiation itself. Ury reasons that while spending time on preparation may be the last thing on someone's mind, most people cannot afford not to prepare. He suggests spending a minute on preparation for every minute of interaction with the other party.[2]

For the second step, using clear and plain language, you must ensure that your client understands the purpose of the negotiation. Many clients fail to appreciate the mixed-motive aspect of negotiation, in which both parties to the negotiation benefit through cooperation. Instead, many perceive the negotiation as a **fixed pie**—that is, the parties' interests are completely opposed and incompatible, which often results in

fixed pie the assumption by a negotiator that the resources and options are fixed

Expanding the pie in a negotiation can lead to more options and win–win results for both parties.

1 W Ury, *Getting Past No: Negotiating Your Way from Confrontation to Cooperation* (New York: Bantam, 1993) at 16.

2 Ibid.

a lose–lose situation for all parties to the negotiation.[3] By expanding the pie, clients can strive to reach win–win agreements, where both parties benefit.

Third, you must clarify the roles of the legal representative and the client. Specifically, you should express exactly how you will participate in the legal action and what you will require from your client. This will validate the relationship between the client and the legal representative and establish rapport between you and your client. In addition, it will enhance participation and openness from your client.

Fourth, you should discuss the format of the negotiation, including the preparation stage, so your client feels comfortable with how things will proceed during the negotiation. For many clients, this may be their first negotiation. The process itself will be new and overwhelming. Not only will this discussion affirm the importance of this stage of the negotiation but it will also help in the next stages as your client becomes more familiar with the terminology and ultimate goals of the negotiation.

Finally, you should remind your client of the confidential nature of the relationship between the client and the legal representative. In the codes of conduct for legal representatives, for example, Rule 3.03 of the *Paralegal Rules of Conduct*,[4] the duty of confidentiality requires paralegals to "at all times, hold in strict confidence all information concerning the business and affairs of a client acquitted in the course of their professional relationship" unless the client authorizes the release or other exceptions apply. This duty commences at the very outset of the client relationship (even prior to a retainer) and continues indefinitely after the legal representative has ceased acting for the client. In particular, the client should clearly understand that not all information offered to the legal representative will be disclosed during the negotiations and will be kept confidential. This may be obvious to some by virtue of the legal representative–client relationship, but no less important in discussing. It is important here to stress that in some cases, revealing certain *confidential* information may be useful to the negotiation. In particular, disclosing a client's viable and attractive alternatives to negotiating an agreement, also known as BATNA (best alternative to a negotiated agreement) as discussed later in this chapter, may empower the client's position.[5] In addition, clients should understand that sharing information with the other party may be beneficial since, as a result of the principle of reciprocity, the other party may be more likely to share information too.

Stage 2: Developing Your Client's Interests

Once your client understands the purpose and general format of the negotiation, it will be easier for you to extract the necessary information from your client. This important stage of developing your client's interests will clarify the client's objectives and power in the negotiation by asking important questions such as "What do you want?" and "What are your alternatives?"[6] Finding answers to these questions will help ascertain what alternatives your client has to a negotiated agreement and what they may aspire to negotiate.

Identifying Issues and Interests

The first step to answering the question "What do you want?" entails a mix of both identifying issues to be deliberated in a negotiation and defining your client's interests.

In this step of identifying issues, your experience and critical mind will quickly be put to use. In any negotiation, developing a complete list of the issues that are at stake will ultimately help your client determine what issues are most important and what issues may be connected or separate. This does not need to be a difficult task and can be easily achieved by brainstorming a list of any possible issues. Using the checklists and theories discussed in Chapter 3, "Theoretical Approaches to Understanding Conflict," such as the human needs theory or the circle of conflict checklist will help the legal representative to explore every potential angle of the conflict. Analyzing the conflict, examining past experiences in similar conflicts, gathering information through research, and consulting with experts are all excellent strategies for identifying the issues.[7] In the event that too many issues are raised, it will be important to narrow the issues by trying to prioritize them. This process will also help with the next stage, identifying the underlying interests of those issues. Fisher and Ury attribute much of their theory of *principled negotiation* to focusing on interests and not positions. They argue that interests are what in fact define the problem since the conflict is actually between each side's needs, desires, concerns, and fears, and not conflicting positions. They note that along with conflicting interests of the parties also lie shared and compatible interests.[8]

How does a legal representative go about identifying the client's interests? By asking your client "why" questions, you will establish your client's values, needs, principles, and basic concerns. The questions should be directed to issues being explored, the conflict itself, the relationship of the parties, and the client's basic human needs. It is therefore key to use a particular style of questioning techniques that will generate the most information about the interests of your client and the case itself. Please see the question types explained in Chapter 4, "Conflict Resolution Skills."

Stage 3: Developing a Target Point

Once your client's interests are set out, at this next stage, you will help your client determine the most desirable outcome for the negotiation. This **target point** can contribute to helping your client achieve the desired objectives and determining what your client might reasonably accept.

target point
a client's most desirable outcome of a negotiation

Establishing a target point will help provide a clear sense of what your client would like to achieve in the negotiation. Quite simply, the "target" refers to the point above the "bottom line" that your client feels would be acceptable. For many, the target point represents the most ideal situation for the client. Research has shown that establishing a higher target benefits clients by achieving more than when lower aspirations are set.[9] However, it is important that legal representatives recognize there are

3 MH Bazerman & MA Neale, "Negotiating Rationally" in JC Kleefeld et al, *Dispute Resolution: Readings and Case Studies*, 4th ed (Toronto: Emond, 2016) at 159.

4 Law Society of Ontario, *Paralegal Rules of Conduct* (1 October 2014; amendments current to 24 February 2022), online: <https://lso.ca/about-lso/legislation-rules/paralegal-rules-of-conduct>. For the most up-to-date material, please visit the website referenced in this footnote.

5 R Fisher & W Ury, *Getting to Yes* (New York: Penguin, 1981) at 102.

6 *Ibid* at 10.

7 RJ Lewicki, B Barry & DM Saunders, "Negotiation" in Kleefeld et al, supra note 3 at 214.

8 Supra note 5 at 41, 42.

weaknesses in establishing a target, including the risk of aiming too low and having the target accepted immediately, or over-aspiring by aiming to high and refusing to make any concessions.[10]

To determine the target point, you should ask your client what facts and interests support a particular outcome that is both reasonable and justifiable. It may be necessary to contact an expert to realistically verify the value and probability of such an outcome. For example, a client involved in a personal injury case should develop a target point that considers "the going rate for certain injuries" that have been established in case law by the courts. Depending on the facts of the particular case, that target would include the value of the injuries, related expenses, and other damages.

Stage 4: Determining the Client's Alternatives—BATNA and WATNA

After establishing the underlying issues and interests of your client, you will be in a position to consider what alternatives your client may have if an agreement cannot be reached. Being prepared with alternatives is critical to any negotiation as clients will want to protect themselves from accepting a bad agreement or failing to accept a good agreement. In most cases, clients enter a negotiation having established a **bottom line**—that is, the least advantageous settlement they would accept or the highest price they would pay.[11] This strategy is primarily used as a defensive mechanism for determining when to walk away from the negotiation and potential settlement. As a simple illustration, consider Sue, who wants to sell her car for $10,000 because she is leaving the country for a year, and is departing in one month. Sue decides in advance of any negotiation that the lowest amount she will sell the vehicle for is $8,000, so that she may break off negotiations if there are offers lower than that bottom line. This protects her from feeling pressured into agreeing to a sale that is simply too low.

bottom line
establishing a final barrier in a negotiation that the client will not negotiate below. The least amount (minimum) that the client would be prepared to accept. It is meant to protect the client against accepting a bad agreement

However, Fisher and Ury have found that there are many disadvantages in using a bottom-line type of approach. They argue that the bottom line, also known as the *minimum disposition*, is often set too high, which keeps parties from agreeing to a solution that they might be wise to accept, particularly when they do not have many other alternatives. In fact, most parties are unable to justify or express why they have picked a particular bottom line. Using our car example above, Sue, who is leaving the country in a month, may not have any interested buyers; however, she still sticks by her bottom line of $8,000. Sue may end up paying more in storage fees for the vehicle instead of accepting a good offer that was slightly less than her bottom line. Unfortunately, she may have based her bottom line on "the value" she attributes to the vehicle, rather than on her interests and the outcome of the negotiation. Using a bottom line may also inhibit imagination and prevent the exploration of other options by being too rigid. For example, Buyer X may offer to pay Sue less than $8,000, but buy it "as is" without the proper certification. Finally, having a bottom line may limit the ability to benefit from what is learned during the course of a negotiation. In a legal case, this can be detrimental to achieving a good settlement. In many negotiations, new information can be obtained that you may not have been aware of during the preparation. A bottom line is not flexible, making it difficult to change or adjust things with your client during the negotiation.[12]

Instead of a rigid bottom line, a legal representative should determine the client's *best alternative to a negotiated agreement*, or **BATNA**, and the client's *worst alternative to a negotiated agreement*, or **WATNA**. Like the bottom line, BATNA and WATNA are tools to help protect the client from making a deal that the client should have rejected or accepted. Knowing the client's BATNA and WATNA will provide the standard against which any proposed agreement can be measured. That way, it will protect the client from accepting terms that are unfavourable, and prevent the client from rejecting terms that they would be wise to accept. BATNA and WATNA will also help the client determine what to do if an agreement is not reached and how important success in the present negotiation might be.

BATNA
best alternative to a negotiated agreement

WATNA
worst alternative to a negotiated agreement

To establish a BATNA, the client and the legal representative must consider all possible alternatives in the event that the upcoming negotiation comes to a deadlock or falls through. The client then identifies the best of the alternatives by choosing the course of action that the client would realistically adopt if those negotiations do in fact break down. That selection becomes the client's BATNA, which can then be used against any potential offers from the opposing party as a measuring tool.

Similarly, the client and the legal representative need to establish the client's WATNA by considering the worst alternatives if the negotiations fail. This will demonstrate to the client the "worst" thing that may happen if the client walks away from the upcoming negotiation. It will help the client understand how important the negotiation might be. By calculating the best and worst alternatives to a negotiated agreement in advance of the negotiation, the client will be better prepared to know when to accept or reject an offer and the consequences of doing so.

It is important not to confuse "alternatives" with "options." Options relate to the ideas and possibilities generated for that particular negotiation and potential agreement. They would not apply within the context of the determining the BATNA or WATNA of the client. *Alternatives*, in contrast, are different courses of action that a party may take in the event that the negotiation falls through. The purpose of determining the BATNA and WATNA is to help the client make informed decisions about any proposed agreement.

The practicalities of determining your client's BATNA may involve a great deal of effort and involvement. You will need to brainstorm with your client viable alternatives to negotiating an agreement. It is not enough to merely consider alternatives; they must be thoroughly explored, each independently evaluated and "made real" by converting them into practical alternatives before one can be selected as the best.

For example, before entering a negotiation, Sue, the car seller in the example above, should contemplate her best alternatives if the negotiation for the vehicle with Buyer X falls through. Her alternatives may include the following:

- Sell the car to someone else.
- Sell the car to a used car dealer.
- Put the vehicle in storage.
- Store the vehicle at a relative's house.

10 D Gifford, "Legal Negotiation: Theory and Application" in CB Wiggins & RL Lowry, *Negotiation and Settlement Advocacy: A Book of Readings* (St Paul, Minn: West, 1997) at 116.

11 *Supra* note 5 at 99

12 G... Negotiating Reality and Responsibil...

In order to be considered real alternatives that can be used as a measure against the original offer by Buyer X, it is key that these alternatives are viable. Sue should find out how many others are interested in buying her vehicle and what their offers might be, she should find out how much it costs to store the vehicle for the year she is away and if there is availability, she should call used car dealers and determine how much they would pay for the car, and she should call family members and see if she really can store the vehicle with them. With that information in hand, Sue can then choose her best alternative—her BATNA—from the ones she is considering. Each offer put forward by Buyer X can then be measured against Sue's BATNA.

Developing and generating these alternatives can be difficult for some clients. In some cases, the client may have relied on their own experts for information about possible alternatives. In other cases, the legal representative will be expected to assist the client in exploring and narrowing alternatives. If the issue is not within your area of experience and expertise, you may need to consult other professionals where appropriate. Providing knowledge and inventiveness about possible alternatives to the negotiated agreement is one of the most valuable areas of expertise that an experienced representative can bring to the client relationship.

Understanding your client's BATNA in advance can also have an important impact on the negotiation. The better and stronger your client's BATNA, the greater your client's confidence and position in a negotiation. Clearly, Sue the car seller would have significantly more confidence going into the negotiation with Buyer X knowing that she has ten other parties interested in her vehicle. Sue may be less confident if her BATNA is weak and there are no other potential buyers. The strength or lack thereof of a BATNA will give Sue a better understanding and knowledge of when to break off negotiations.

For the legal representative, determining the client's WATNA will help to prevent the client from being too optimistic about their alternatives if the parties are unable to reach a settlement. Knowing what the worst alternative is to the negotiated agreement will assist the legal representative in forcing the client to acknowledge the reality of the bargaining situation. There are clients who "want it all" and simply refuse to acknowledge a potentially bad outcome. They may in turn use the legal representative as a scapegoat and blame the legal representative for poor negotiating skills if the negotiation is not successful. This preparation will protect the legal representative from potential complaints and turn the client's mind to properly assessing the alternatives. In the example, Sue's WATNA would be that she is unable to sell the vehicle and a used car dealer will take the vehicle for $500.

You must also take care to advise your client in the event of a highly undesirable WATNA. The client may want to retain a good working relationship with the opposing party, particularly if the opposing party becomes aware of the client's WATNA.

Should you ever disclose your client's BATNA or WATNA in a negotiation? It depends. Disclosing the BATNA during a negotiation will largely depend on the strength of the BATNA. When the BATNA is strong, your client may want to disclose the BATNA, ultimately putting pressure on the other party to accept the offer put forward. In our example, it would benefit Sue to let Buyer X know that she has many other potential buyers. As a result, Buyer X would be less likely to submit a lower offer. On the other hand, Sue would not want to disclose a weak BATNA as the other party may try to use the fact that she does not have good alternatives to pressure her into accepting a lower offer. Typically, you should avoid disclosing the client's WATNA as it is not useful to discuss the client's WATNA with the opposing party. However, in the event the client's WATNA is strong, then it may be beneficial to disclose that to the other party. For example, if the client's WATNA is going to court when your client has a very strong legal case, it may be worth discussing this with the other side. Showing that strength in the case may prompt the opposing party to settle and avoid court. This is particularly useful in the event it appears that the opposing party is not receiving reasonable legal advice from their representative or is not being realistic about their position.

Keep in mind that in using the BATNA/WATNA terminology with the client might be confusing and unfamiliar. In that case, you can use other ways to describe this analysis, such as "alternatives outside of the negotiation" or "best and worst walk-away alternative."

To summarize, you should assist your client in generating a BATNA and WATNA by doing the following:

- ☑ Generate a list of possible actions the client may take if no agreement is reached in the negotiation.
- ☑ Make the alternatives real by exploring the best ideas and researching them to make them viable.
- ☑ Determine the client's BATNA by selecting the most realistic and best alternative that the client would act upon should the negotiation break down.
- ☑ Determine the client's WATNA by selecting the worst alternatives to a negotiated agreement if the upcoming negotiations fail.
- ☑ During the negotiation, judge every possible option against the best and worst alternatives (BATNA and WATNA) that the client chose.

Stage 5: Understanding the Other Party's Interests

Once the legal representative and the client have a clear understanding of the client's BATNA and WATNA, the next stage requires an assessment of the other party's priorities and interests. It is crucial at this point for you to explore the BATNA of the opposing party in the negotiation. For the same reasons, your client will benefit from knowing the strength or weakness of the other party's alternatives going into the negotiation. You will be able to better assess how to approach the negotiation.

Specifically, you will need to research what alternatives to a negotiated agreement are available to the other side before negotiating. By knowing the other party's alternatives, or BATNA, your client will garner a better understanding of what to expect from the negotiation. This can help empower your client by lowering the expectations of the other party in situations where they may have overestimated their BATNA or by helping your client detect bluffing.[13] RJ Lewicki and colleagues advise that by comparing another's BATNA against our own,

> we can begin to define areas where there may be strong conflict (we both have a high priority of the same thing), simple tradeoffs (we want the same group of

13 Fisher & Ury, supra note 5 at 105.

things but in differing priorities), or no conflict at all (we want very different things and can easily both have our objectives and interests met).[14]

By knowing the BATNA of both parties, it might become clear that the best decision in the negotiation would be to walk away.

At this stage, both your client's and the other party's alternatives will have been explored. It is important to note that any evaluation of the alternatives is inherently subjective and depends very much on perception. Interestingly, research has shown that even when using the same facts, the viable alternatives will differ depending on whether you are a buyer, seller, or neutral party. As a result, legal representatives should be conscious of different possible perceptions of the same alternatives.[15] The danger is that as each side overestimates the attractiveness of their alternatives, the parties may fail to find any common zone of possible agreement. The legal representative will therefore need not only to be more realistic about their own alternatives, but also to seek ways to alter their opponent's estimates of their alternatives.

Stage 6: Reviewing the Strengths and Weaknesses of Your Client's Case

After your client's interests and BATNA have been properly considered, you will need to review the overall strengths and weaknesses of your client's legal case. The discussion should include a thorough assessment of not only the alternatives that may be considered during the negotiation, but also the possible outcome of adjudicating the matter in court. Ahead of any reality-check pre-trial process, this type of frank discussion will help your client determine whether settling through some form of alternative dispute resolution (ADR) will be more beneficial than the alternative of going to court. For most clients that start a legal action, the only resolution of the matter is in court. However, in Chapter 1, we learned that less than 5 percent of legal actions actually go to trial and either settle out of court or are withdrawn. Such a discussion between you and your client ahead of time will provide a rational comparison of adjudication versus settlement. It will also help to eliminate frustrating situations where your client views going to court as a better alternative than settling at the negotiation or vice versa.

Any assessment at this stage must include a consideration of the costs, both monetary and non-monetary, of applying an ADR process or proceeding to trial. There will always be some form of costs either at trial or through early settlement, regardless of the outcome for your client. These costs include legal fees that could not be recouped at trial and also an assessment of the "risk" of going to trial. The client could then compare the final result (factoring in costs and risk assessment) of an early settlement through some form of ADR with the final result of proceeding to trial. Of course, costs that have already been incurred by the parties may not have an impact on this consideration. This analysis may further prove to have some persuasive influence on opposing parties.

Such discussions are important in risk management for the legal representative. Any time the outcome of the legal action (whether at trial or settlement) does not go in the direction the client desires, the legal representative may risk being "blamed" regardless of their efforts. By discussing this in advance, you can reduce the number of surprises your client may experience at the negotiation when your client is hearing about their alternatives for the first time. Going into the negotiation, your client should know quite clearly the risk of going to court as compared with any settlement offer.

Factored into this assessment is how much your client is willing to give up to settle if not pursuing the full claim in court. One of these considerations is how much the relationship with the opposing party is worth salvaging or continuing in the long term. While this may be difficult to quantify, destruction of long-term relationships is a real consequence of going to court.

Stage 7: Rehearsing the Negotiation

The final stage of preparation for the negotiation is the rehearsal with the client. For many first-time clients, rehearsing the negotiation will be a critical part of the preparation for the negotiation. For others, any rehearsal may seem somewhat redundant. In either case, however, the importance of practising and "going through the act" cannot be overstated. By carefully walking through each stage of the negotiation, both legal representative and the client will feel more comfortable with the material and issues addressed in the negotiation, as well as develop a better understanding of each other's roles. Often you and your client may discover new issues and facts or old ones that were neglected. Once the negotiation begins, many parties can easily stray off track and become caught up in the emotion of the negotiation. By practising each stage of the negotiation, your client will be less likely to stray from the important issues. Finally, it allows the client and legal representative to review expectations about confidential information and avoid any missteps during the negotiation. As the old saying goes, "practice makes perfect."

Stage 8: Drafting a Settlement Agreement

When the parties agree to a settlement through negotiation or mediation, the details of the settlement will be documented in a **settlement agreement**. A settlement agreement is a legally binding contract that the parties use to settle the dispute and avoid going to court. It is important that the agreement is carefully drafted as it is a powerful document that is enforceable by the courts. Settlement agreements are governed by contract laws of that jurisdiction and must conform to those legal requirements.

settlement agreement a legally binding contract that the parties use to settle the dispute and avoid going to court

A settlement agreement will typically contain a brief summary of what the parties have agreed to, any specific terms that apply, for example a payment plan, details of future expectations for the parties, such as how they will communicate in the future, a confidentiality clause, and a release, if relevant. While these agreements may be confidential, they can be enforced through contract law if one of the parties does not follow through with the agreement.

In advance of the negotiation, the legal representative should prepare the client for a potential settlement that may be agreed to at the negotiation. That means discussing with the client what a settlement agreement is, the pros and cons of a settlement agreement, what terms are typically included in a settlement agreement, and how a settlement agreement is enforceable. This is necessary information for the client to properly assess their options and determine if a settlement agreement will meet their desired outcome for resolving the dispute. The client needs to be clear about how terms and conditions in a settlement agreement might affect them in the future.

14 Lewicki et al, *supra* note 7 at 230.

15 DA Lax & JK Sebenius, "The Power of Alternatives or the Limits to Negotiation" in Wiggins & Lowry, *supra* note 10 at 112.

Steps to Consider in Negotiating a Settlement Agreement

Step 1: Determine that the parties have the ability to enter into a settlement agreement. Ensure that both parties at the negotiation have the legal capacity to enter into an agreement. Do they have the authority to bind a party who might be a company? Do they have the mental capacity to enter into a contract?

Step 2: Consider the elements of a valid contract. Ensure that all of the elements are there to create a legal binding contract including offer, acceptance, valid consideration, certainty of terms, intention to contract, and contractual requirements by particular jurisdictions.

Step 3: Determine consideration of the Agreement. The parties need to identify exactly what of value one party is giving up in return for a promise or obligation by another. For example, often in a negotiation resulting from a legal dispute, one party may give up the right to pursue a legal remedy in return for monetary compensation and/or other remedies or benefits. Terms of the consideration should include payment arrangements such as start date, frequency, amount, duration, and other non-monetary terms.

Step 4: Consider admission of liability. The parties may only agree to settle a dispute if it means they do not agree to any liability in the dispute. This is often a contentious issue as plaintiffs will want to warn others about the wrongdoing of the opposing party. The opposing party will often add a term in the agreement setting out that the settlement not be construed as an admission of fault or wrongdoing. Settlement agreements are often considered "a **release**" from liability in an action. Meaning that one person gives up their legal claim against another person in exchange for some other act, such as the exchange of money and other potential terms. By giving up that legal claim, the opposing party is not considered legally liable or responsible for any damages in the dispute.

release
a term within a settlement agreement wherein the parties agree to give up any claims related to the initial legal matter in dispute against the other, including claims that are not yet known; also known as a mutual release or waiver

Step 5: Determine whether to include a confidentiality clause. The parties will need to decide if the settlement agreement will be confidential. This means that neither party would be able to discuss the terms of the settlement agreement with anyone else, except as required by law. This type of provision is common in consumer disputes with a corporation where the corporation wants to protect its image and reputation by restricting what the consumer can reveal about the incident. Other examples include medical malpractice or other professional malpractice disputes. Any violation of this clause would be considered a material breach of contract.

CONFIDENTIALITY CLAUSE

Fact Situation

You are a paralegal representing a tenant in a dispute between a landlord and tenant. The tenant, as applicant, has brought an application before the Landlord and Tenant Board to cancel their lease. The tenant is alleging that the landlord has been entering the apartment without warning and that the landlord has not complied with necessary essential repairs. There are bedbugs in the apartment, and the toilet has been plugged for days. The tenant wants out of the lease and has found another apartment that is well-maintained. The lease agreement imposes a major penalty on the tenant if the tenant proceeds to break the lease. Prior to the hearing, the landlord proposes to settle the dispute by releasing the tenant from the lease without penalty but only if the tenant signs a settlement agreement that contains a "confidentiality clause" which would prevent the tenant from discussing the matter with anyone now and in the future. The tenant does not want to be silenced. The tenant wants to warn other potential tenants about the "slum" landlord and not be restricted in this way.

Question for Discussion

Discuss the pros and cons about the impact of a confidentiality clause in this situation.

Step 6: Consider dismissal of ongoing litigation. The purpose of negotiating a settlement agreement in a legal action is often to avoid going to trial. If you are negotiating a settlement agreement after litigation has been initiated, the parties may want to add a term dismissing the original claim.

PRACTICE TIP

How to draft an effective settlement agreement:

- Use plain language. The parties should be able to understand the contents of the agreement without the need to consult a professional.
- Specify dates and details.
- Use the full names of the parties involved.
- Document details of the agreement.
- Ensure that both parties agree with the content of the agreement.
- Consider whether it is necessary to include a confidentiality clause.
- Consider whether it is necessary to include a release of the parties from the current action and any matters related to the incident.
- Include what the parties agree to do if the agreement is not followed by one of the parties.
- Review sample Settlement Agreements for reference (e.g., Form 14D Small Claims Court Terms of Settlement below).

ONTARIO
Superior Court of Justice

Terms of Settlement

Form 14D Ont. Reg. No.: 258/98

Small Claims Court

Claim No.

Address

Phone Number

BETWEEN

Plaintiff(s)

and

Defendant(s)

We have agreed to settle this action on the following terms:

1. _____ shall pay to
(Name of party(ies))

_____ the sum of
(Name of party(ies))

$_____ as follows as full and final settlement of the claim, inclusive of interest and costs:
(Provide terms of payment such as start date, frequency, amount and duration.)

Put a line through any blank spaces and initial.

Les formules des tribunaux sont affichées en anglais et en français sur le site www.ontariocourtforms.on.ca. Visitez ce site pour des renseignements sur des formats accessibles.

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Claim No.

2. This claim (and Defendant's Claim, if any) is withdrawn.

3. If a party to these terms of settlement fails to comply, judgment in the terms of settlement may be obtained against that party on motion to the court or this action may continue as if there has been no settlement.

4. Provided that the terms of settlement are complied with, the parties above fully and finally release one another from all claims related to the facts and issues raised in this action.

The parties do not need to sign terms of settlement on the same day, but each must sign in the presence of his or her witness who signs a moment later. (For additional parties' signatures, attach a separate sheet in the below format.)

_____, 20____	_____, 20____
(Signature of party)	(Signature of party)
(Name of party)	(Name of party)
(Signature of witness)	(Signature of witness)
(Name of witness)	(Name of witness)
_____, 20____	_____, 20____
(Signature of party)	(Signature of party)
(Name of party)	(Name of party)
(Signature of witness)	(Signature of witness)
(Name of witness)	(Name of witness)

Save Form | Print Form | Clear Form

RSCC-14D-E (2014/01)

Stage 9: Other Considerations When Preparing: The Ethics of Negotiating

Unlike adjudication, the negotiation process is not subject to a strict set of rules and guidelines and is immune to any serious scrutiny. The very essence of negotiation and bargaining involves behaviour and practices where one might "bluff," "puff," or "bend the truth." However, there is no question that too much "bending" may lead to unacceptable, unlawful, and unethical behaviour.

While a lawyer must still adhere to a code of ethics when negotiating, there are no formal court rules that must be followed. Similarly, in Ontario, paralegals are subject to a code of ethics with their new regulatory scheme.[16] Other representatives may or may not be subject to a particular code of ethics. For example, certain tribunals continue to allow colleagues, family or friends to act as representatives for the party and are not subject to any ethical code. Code of ethics or not, there exists much ambiguity with respect to any representative's ethical obligations in bargaining and negotiation.

What does the supposed "lawlessness" of negotiation mean in actual practice? The greatest concern surrounds the amount or level of truth expressed by these very advocates on behalf of their clients. Many insist that a modest degree of deception is merely a skilled bargaining tactic and a part of the process. Others argue that any manipulation of the truth is unlawful and unfair, and should be subject to regulation.

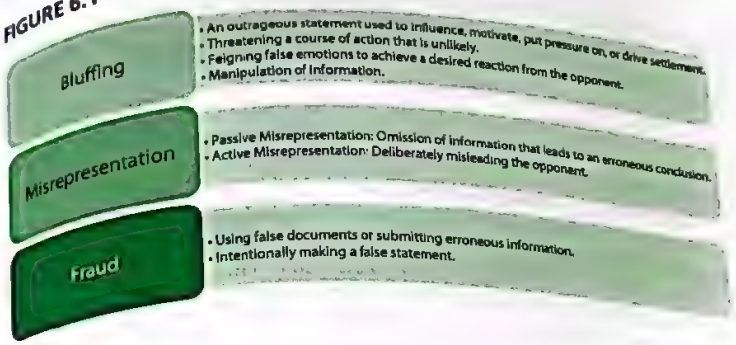
The area is certainly grey and the waters murky when attempting to determine acceptable levels of deception in negotiation. For example, author Eleanor Holmes Norton gives the example of the person with only a slight injury to the neck who chooses to wear an unnecessary neck brace to the negotiation session where her injury will be assessed. On the one hand, the unspoken act is strategic because it creates the impression of a serious injury warranting compensation; on the other hand, it is unethical and probably illegal to portray the false impression of a serious injury, which could in some cases amount to fraud. Norton argues that some ethical problems arise as a natural consequence of the desire to capitalize on negotiation skills.[17] This fits within the context of a free market environment and "buyer beware" society, where it is up to the buyer to determine any inconsistencies and seek out the truth. However, a buyer beware type of scenario is not often realistic in the legal environment, where damages are directly linked to proven facts in a case with evidence that is presented by the parties. Unfortunately, traditional controls, such as codes and regulations, are unable to create clear and express limitations on ethical negotiation as it is difficult to contemplate all types of unethical factual scenarios.

What makes negotiation so difficult to police in the same way as adjudication? James J White writes that several circumstances contribute to this difficulty. First, negotiation as a closed, confidential discussion that is not open to the public limits the probability of lies or deceptive practices being detected. Consequently, that low probability of being detected and punished

16 You can find the Law Society of Ontario's *Paralegal Rules of Conduct* online, supra note 4

17 EH Norton, "Bargaining and the Ethic of Process" in Wiggins & Lowry, supra note 10 at 259.

FIGURE 6.1 Expanding the Pie in Negotiation



means that many lawyers will violate the standard, the standard becomes even more difficult for the honest lawyer to follow and by doing so he may be forfeiting a significant advantage for his client to others who do not follow the rules.[18]

Second, and most paradoxical, is the difficulty in drafting ethical norms that apply to every subject matter, process, type of negotiation, and style of negotiator. White submits that even the most forthright, honest, and trustworthy negotiators will actively engage in misleading their opponents about their true positions. The negotiator's responsibility is a true paradox of one who is "fair" but who will also "mislead."[19]

Is There an Ethical Baseline Standard for the Paralegal?

Despite the grey areas, many contend that there are rules governing how negotiations may be conducted ethically. These rules, according to Rex R Perschbacher, comprise the very laws that each and every legal representative must adhere to every day. First, rules established in a profession's code of conduct can establish acceptable behaviour. For example, licensed paralegals in Ontario must adhere to the *Paralegal Rules of Conduct* established by their regulating body, the Law Society of Ontario. However, like the rules of conduct that lawyers are subject to, these rules of conduct imposed by the Law Society do not impose any real regulatory teeth as to how lawyers and paralegals must conduct themselves during negotiations.

Perschbacher sees the law as the factor in determining what will amount to ethical behaviour. No matter the negotiation, each choice made by an agent for a client involved in a negotiation is subject to the legal consequences of their actions, both to the client and to the other parties to the negotiation set out in the codes of conduct for those particular legal representatives.

> In dealing with clients, the rules of contract, torts, and agency law regulate and restrict a legal representative's freedom to act independently and require close consultation with clients. Legal representatives must act in accordance with their client retainer agreement (contract) within their authority and follow reasonable

18 JJ White, "Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation" in Wiggins & Lowry, supra note 10 at 260.

19 *Ibid* at 261.

instructions from their clients, who possess final decision-making responsibility over the objectives of the representation. Lawyers must provide clients with all material information to make those decisions, keep them informed of the progress of the negotiations, and act competently and diligently in pursuing clients' interests.[20]

To some, it may appear that the client is the party that is primarily at risk in the negotiation. However, the legal representative has much at stake in the outcome of the negotiations. In some cases, payment of the legal representative's services is tied to the outcome of the negotiation, referred to as contingency fee arrangements.

The sort of legal regulation discussed above may not assist with all ethical dilemmas of negotiation. However, adherence to the law will assist legal representatives in examining the legal consequences of their conduct for their clients and other parties, and lead to a more accountable negotiation and ultimately a more ethical one.

It is easy to see from the above discussion that determining whether a particular tactic in negotiation is ethically appropriate is a difficult task even for the most experienced lawyer. By asking yourself certain questions, you can more easily evaluate the ethical outcome when confronted with these situations.

David Lax and James K Sebenius offer several bits of advice and questions to consider when you are faced with the question of whether a tactic is ethically appropriate.[21] They suggest making the following considerations: whether you would like the person that you saw in the mirror; whether you would be comfortable if your friends, family, and colleagues were aware of the tactic you used; consider questions about reciprocity and the Golden Rule (how you would feel if someone did it to you); consider whether the whole issue could be avoided by using an alternative tactic; and look at the broader social impact as to the desirability of a society where everyone bargained this way.

The ethical behaviour of opposing counsel and their client in a negotiation is also an important consideration in a negotiation. The legal representative must prepare themselves and their client for any deceptive tactics, including sharp practice that may be applied by others.

RECURRING CASE STUDY

The day after her dinner with Mary, Angela contacted a paralegal. The paralegal explained that taking the matter to court would take several months. He also indicated that there would be no guarantee that she would be able to recover the full $1,000. When he advised her of his hourly rate, Angela realized that it might not be cost effective to retain him to represent her in court. As she was about to leave, the paralegal advised her that he would be willing to meet with Mary to see if they could negotiate a settlement. He would charge Angela a reasonable flat rate in an effort to get the matter resolved. Angela decided to retain him and they started to discuss the matter in detail in order to prepare for negotiations.

Later that day, Angela's paralegal called Mary to set up a meeting. Mary was shocked that Angela had hired a legal representative. With Leo away, she felt that she had no option but to also hire a paralegal. Mary contacted a local paralegal who said that she would be willing to talk with the paralegal, but that she thinks that ADR is "a waste of time" and that the matter would be better resolved in court. Mary and the paralegal agreed to meet 15 minutes prior to the scheduled meeting with the other side in order to prepare.

During their scheduled negotiation, Angela's paralegal presented his client's position and tried to explain why Angela had come to that position. However, he was continually interrupted by Mary's paralegal who sat across the table with her arms crossed as she constantly shook her head and rolled her eyes. Mary's paralegal seemed confused by the facts of the matter and made a few incorrect assumptions throughout the discussion. Any time Angela's paralegal asked a question, Mary's paralegal had to consult with her client and flip through her notes.

Very little progress was made and the discussions broke down. Afterwards, Mary's paralegal told Mary in private that she had intentionally embellished the truth in an effort to ensure that Mary would pay the least amount possible.

Discussion of Scenario

- *Time to Prepare*: Angela's paralegal took the time to properly prepare for negotiation, but Mary's paralegal only set aside 15 minutes to gain an understanding of the case and what was important to her client. As a general rule, paralegals should spend the same amount of time to prepare for negotiation as they plan to spend actually negotiating.
- *Gain a Full Understanding of the Matter*: In preparing to negotiate on behalf of a client, paralegals should gain a full understanding of the matter by considering the positions and interests of both parties, possible options, objective criteria and the BATNA for each side. Angela's paralegal considered the following:
  - Angela's Position: Wants full compensation for the damage to her belongings.
  - Mary's Position: Wants to pay a minimal amount to compensate Angela.
  - Angela's Interests: Her figure skates are custom-made and have sentimental value; needs to purchase new skates and replace her other items; would like to continue to rent the basement apartment from Mary.
  - Mary's Interests: Ensuring that any amount paid to Angela would be agreeable to Leo, would like to continue to rent the basement apartment to Angela
  - Options: Reduce Angela's rent for the remainder of the lease; repair the skates instead of replacing them; terminate the lease early.
  - Objective Criteria: Water damage clause in insurance contract; lease agreement between the parties, landlord and tenant law; actual cost of replacing the damaged items.
  - Angela's BATNA: Take the matter to small claims court and find a new place to live.
  - Mary's BATNA: Take the matter to small claims court and find a new tenant.
- Use Appropriate Conflict Resolution Skills: Mary's paralegal did not use appropriate conflict resolution skills during the discussions. She should have been aware of her body language (e.g , crossed arms, shaking her head, rolling her eyes).
- Competency: The Paralegal Rules of Conduct require paralegals to be competent in substantive and procedural law and to demonstrate competency in the use of their skills. Based on the information in the scenario, Mary's paralegal has not demonstrated the competency that would be required to appropriately resolve this matter.
- Sharp Practice: The Paralegal Rules of Conduct prohibit sharp practice. The intentional embellishment of the truth by Mary's paralegal could be considered sharp practice and prompt an investigation by the Law Society of Ontario.
- Promote ADR: The Paralegal Rules of Conduct require paralegals to inform clients of their ADR options and to recommend settlement when it is reasonable to do so. Mary's paralegal did not promote ADR and seemed to dissuade her client from resolving the matter outside of the courtroom.

20 RR Perschbacher, "Regulating Lawyers' Negotiations" in Wiggins & Lowry, *supra* note 10 at 289.

21 DA Lax & JK Sebenius, "Three Ethical Issues in Negotiation" in Wiggins & Lowry, *supra* note 10 at 277.

CHAPTER SUMMARY

Success in a negotiation depends on many factors; however, the most significant factors can be attributed to preparation. Legal representatives will face a number of different adversaries in negotiations, including aggressive negotiators and those who put on intense pressure to settle. Prepared representatives and clients can most certainly avoid any pitfalls or traps of a negotiation. With that in mind, representatives must understand their role in negotiation as a carefully planned execution strategy. In addition, clients will expect their legal representatives to have a certain level of skill, training, and understanding of the dynamics of a negotiation to help them succeed in the best way possible. That success will involve an enormous amount of preparation. Clients typically do not have the experience, knowledge, or background to know exactly how to prepare and conduct the negotiation. They do not know what they want, or they may not want what they ought to want. They may change their minds in unpredictable ways, or they may not change their minds when they ought to do so. Through proper training and understanding, representatives can ensure that clients are prepared and successful in the negotiation.

In addition to preparation, competent representatives must have a clear understanding of ethical impacts on negotiation. Despite the duties set out in the industry's codes of conduct, the *Paralegal Rules of Conduct*, there are many grey areas and contradictions that can lead to ethical dilemmas for representatives in negotiations. Negotiation is a complex form of resolving disputes; however, through preparation, sound skills, and an awareness of ethics, the legal representative can minimize the negative impacts on negotiation and find positive outcomes for their client.

KEY TERMS

BATNA, **135**
bottom line, **134**
fixed pie, **131**
release, **140**
settlement agreement, **139**
target point, **133**
WATNA, **135**

REVIEW QUESTIONS

1. Briefly outline the ways that adequate preparation by the legal representative in a negotiation will benefit the client.
2. You are a paralegal working at a busy paralegal firm. You currently have a caseload of 100 files at various stages of litigation. You have a case that you believe could benefit from some active negotiation with the opposing party. The negotiation is coming up next week. You are concerned because much of your time in the next several weeks is scheduled for court and client meetings. What is the first step that is key to ensuring you are ready for the negotiation?
3. As a general rule, how much time should you spend preparing to negotiate in comparison to how much time you spend actually negotiating?
4. Discuss why using clear and plain language to ensure that the client understands the purpose of negotiation is important for the negotiation.
5. Discuss why the format of the negotiation is an important point of discussion with the client in advance of the negotiation.
6. You are a legal representative acting on behalf of a client in a contractual dispute between two businesses. Your client is currently experiencing some financial difficulties, but does not want the opposing party to know about those difficulties. The parties are scheduled to negotiate a resolution in the next week. In preparing your client for the negotiation, what can you advise to ensure that certain information will not be disclosed?
7. What do the terms BATNA and WATNA stand for?
8. Discuss the benefits of exploring a client's BATNA instead of determining the client's bottom line.
9. Nathan is leaving the country in two weeks and wants to sell his car. He is hoping to sell it for at least $5,000. He has been contacted by Bart, who has offered him $3,000. He is not sure whether to accept that amount.
   a. Explain how using a BATNA would help Nathan.
   b. In preparing for the negotiation, list four other alternatives should the negotiations with Bart break down.
   c. Based on the alternatives you noted above, select one that would be Nathan's BATNA and explain your selection.
   d. What would Bart's BATNA be?
   e. What could Nathan use as objective criteria to determine a fair offer for the vehicle?
10. Explain whether you feel there is an ethical baseline standard for the legal representatives.

EXERCISES

1. Activity: BATNA Analysis—Round the World (see Appendix A)
2. Role Play: Petals Flower Delivery Negotiation (see Appendix B)

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Appendix A Activity: BATNA Analysis—Round the World

Type BATNA Comprehension Activity

Participants Each student working independently or in groups

Level of Difficulty Introductory

Time Set aside approximately 20 minutes for this activity, including 10–15 minutes to complete and 5–10 for the debrief

Objectives

- Use a practical scenario to reinforce an understanding of BATNA and how it works
- Learn how BATNA can be used in a negotiation by analyzing alternatives

Procedure

- Ask students to work through the scenario and answer the following questions either independently or in groups

Debriefing with Students

- Ask students to share their results on a whiteboard or other group space
- Discuss the various alternatives noted by each group
- Distinguish between the pros and cons put forward by students.
- Discuss the strength and weaknesses of each alternative.
- Discuss how knowing the BATNA can assist in the negotiation and be used as a measurement against offers put forward
- Should the students ever reveal their BATNA? Why or why not?

Scenario

Leanne Baker is hoping to sell her vehicle. She has been studying Marketing at Humber College for the last couple of years, and has decided to take a trip around the world before taking on a full-time job

It has been an extremely busy semester and Leanne has not had much extra time. Her last two years have been so hectic that she has not been able to take a break from her studies and part-time jobs. Immediately after graduation, she booked her ticket to travel around the world. She is scheduled to fly out one week from today, and does not know for certain when she will be returning. However, she believes she will be gone at least a year. Of course, Leanne will need some funds to travel with. She is therefore trying to liquidate some of her assets by selling off things that she does not need anymore. She has already given her required 60-day notice of termination for her apartment. Her parents live about an hour away, so Leanne will be able to move some items to her parent's place while she is away. However, there will not be much space, as her parents have downsized and now live in a small bungalow.

For the last several years, Leanne has been driving a Honda civic she bought second hand from her cousin for $7,000. She had driven it to and from school and it has served her well, as it does not use too much gas. Since she will be gone for a year, Leanne would like to sell her vehicle and use the money for her trip. However, she does not want to give it away and would like good money for it. Leanne knows that when she returns in a year, she will likely need a vehicle for job interviews and, eventually, work.

She has posted the ad on Kijiji to sell the vehicle for $4,000 and received a couple of responses but not as many as she had hoped. Leanne knows there is a used car dealership down the street that also buys used vehicles but usually at a huge discount. One of her neighbours, Drew Smith, is interested in buying the vehicle. He has been a good friend for a while and has helped her out on occasion when she has needed to move her stuff out of the apartment. Drew is a student, so he likely does not have a lot of money. He recently found a job on the other end of the city and is looking for reliable transportation with good gas mileage.

Appendix A Continued

Worksheet: BATNA Analysis

Step 1: Leanne's Position:
What does Leanne want?

Step 2: Consider Leanne's Interests:
Identify the interests that have led Leanne to her position.

1.
2.
3.
4.

Step 3: Determine Leanne's Alternatives
In the event Drew and Leanne are not able to negotiate a deal, what are Leanne's alternatives?

1.
2.
3.
4.

Step 4: Make the Alternatives Real
To be effective, Leanne would need to make the alternatives "real" by taking steps to ensure the alternatives are viable and have a clear outcome. What could Leanne do to verify these alternatives?

1.
2.
3.
4.

Step 5: Determine the Pros and Cons of Each of the Alternatives
Using the alternatives identified in Step 4, list the pros and cons for each.

Alternative	Pros	Cons
1.		
2.		
3.		
4.		

Step 6: Select the Alternative that Offers the Best Outcome for Leanne
In the event the current negotiation fails, which alternative is Leanne likely to pursue?

Step 7: What is Drew's Position?
What does Drew want?

Step 8: Consider Drew's Interests
Identify the interests that have led Drew to his position.

1. _____
2. _____
3. _____
4. _____

Step 9: Determine Drew's alternatives
In the event Drew and Leanne are not able to negotiate a deal, what are Drew's alternatives?

1. _____
2. _____
3. _____
4. _____

Step 10: Determine the Pros and Cons of Each of the Alternatives
Using the alternatives identified in Step 9, list the pros and cons for each.

Alternative	Pros	Cons
1.		
2.		
3.		
4.		

Step 11: Select the Alternative that Offers the Best Outcome for Drew
In the event the current negotiation fails, which alternative is Drew likely to pursue?

Type: Negotiation Role Play Activity
Participants: Two paralegals
Level of Difficulty: Intermediate
Time: Set aside approximately 60 minutes for this activity, including 20 minutes preparation, 30 minutes for the negotiation, and 10 minutes for the debrief.

Objectives
- Allow students to negotiate a dispute using the ADR Worksheet.
- Introduce BATNA and settlement agreement in the negotiation.

Procedure
- Ask students to break out into groups of 2 and select a paralegal role.
- 20 minutes of student preparation using the ADR Worksheet.
- Complete the settlement agreement using the template provided in Appendix B.
- Begin Negotiation Step by Step:
  - 2 min.: Students introduce each other and engage in *small talk*. Develop a rapport with your opposing party.
  - 5 min.: Begin a *discussion of interests*. Students should *not* negotiate an agreement during this stage. Gather information by asking questions and using active listening skills.
  - 10 min.: Conduct *brainstorming* together on a separate sheet of paper.
  - 5 min.: Discuss *options* using *objective criteria*.
  - 5 min.: Negotiate a potential agreement.
  - 5 min.: Draft final *settlement agreement*.

Debriefing with Students
- Ask students to share their group's settlement agreement.
- Discuss how many different terms may be included in the settlement agreement.
- Discuss how the relationship with the neighbours might affect the outcome.
- What was their BATNA? How did it affect their ability to negotiate a resolution?
- Discuss how the settlement would be different from the result of going to court.
- Has any student had a similar experience like this before with a neighbour? Refer to similar disputes such as a recent case in Florida that involves a homeowner who returned home to find cinder blocks cemented along his driveway by his neighbour claiming an alleged property line.[22]

Background Information for Both Parties
Ted Rutherford and Scott Matheson have lived next door to each other in downtown Hamilton for the last ten years. Although they are not best friends, they get along well, and will often put out the garbage and picked up the mail for each other when one is away. Ted Rutherford is married to Ashley and they do not have any children. Scott Matheson, a busy landscaper, is married to Kelsie, and they have two young children. The families live in detached houses but they share a driveway that gives both of them access to the back of their property, where they each have a garage. The actual property line is not quite right down the middle, but they are both able to access their respective garages quite easily.

About two years ago, Ted and Ashley Rutherford started Petals Flower Delivery, a flower delivery business that operates out of their home. As the business began to grow, there would often be flower delivery trucks blocking the driveway. The Mathesons were becoming increasingly frustrated. Their garage was often blocked, and they were not able to access their items or use the driveway when they needed to.

Finally, Scott could not take it anymore. Given that Scott's job involved landscaping, he took some of the extra materials he had and built a fence right along the property line. Since the property line did not divide the driveway evenly, there was seven feet of space on Scott's side and only two feet of space on Ted's side of the driveway. Ted was furious. The two-foot space was so small, he was not even able to carry the massive flower arrangements from the back of the house to the front, where the truck was now parked. Frustrated, and pressured by orders that needed to be delivered on time, Ted tore down the fence. Shortly after that, the policed arrived at his house. The police refused to press any charges at this point and encouraged the neighbours to sort the dispute out amongst themselves.

Unfortunately, the matter has now worsened. The neighbours are refusing to speak to each other, and the whole incident is making things difficult with other

22 Myriah Towner, "Now That's Crazy Paving! Homeowner Arrives Home to Find Neighbor Has Claimed Half His Driveway in Land Dispute," Daily Mail (25 May 2015), online: <https://www.dailymail.co.uk/news/article-3095529/Florida-man-returns-home-wall-cemented-cinder-blocks-lining-driveway-neighbor-claims-half-property.html>.

neighbours on the street. The neighbourhood street party may be cancelled because of the feud, as Scott is one of the head organizers and Ted secures the permits from the city.

Scott Matheson's Instructions

Now that the fence is down, Scott is worried that Ted will start blocking the driveway with his flower truck again. He wants to act quickly and bring a lawsuit to obtain an injunction that will prevent Ted from parking his truck in the driveway.

Other than the current situation, Scott is happy with his house, the location, and the neighbourhood. He does not want to move. It is a great location in downtown Hamilton, and he and his wife believe it will be the perfect place to live once the kids grow up and leave the house.

Scott is also disappointed with his neighbour. They got along quite well before this situation developed. Now, the relationship is so strained that Scott is not sure who he can rely on to take out their garbage and pick up the mail when they leave for Ottawa for the holidays. However, Scott is still fuming. Tim did not consider the impact the blocked driveway would have on the Mathesons. It has made it difficult for his girls to take out their bikes on their own, and the large truck makes it difficult for drivers to see the kids. Besides, the driveway is mostly on the Mathesons' property, so Ted should not feel like it is his right to use it as he wants to. In fact, Scott feels that Ted should be paying him to use his side of the driveway.

Scott has hired you, a paralegal, to assist him. You have discussed and ascertained the facts in his case. According to your obligations under the *Paralegal Rules of Conduct*, Rule 3, you are required to consider all possible options and advise your client on the appropriate course of action, including negotiation, alternative dispute resolution, and advocacy (Rule 3.01(4)). Specifically, Rule 3.02(12) requires a paralegal to "consider the use of alternative dispute resolution (ADR) when appropriate, inform the client of ADR options, and, if so instructed, take steps to pursue those options."

In addition, Rule 3.02(11) requires a paralegal to "advise and encourage a client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis" and to "discourage the client from commencing or continuing useless legal proceedings."

You recognize right away that this type of case should settle. There are simply too many consequences should it proceed to court. For starters, it would cost a lot of money, and going to court would potentially damage the neighbours' relationship beyond repair.

You recommend negotiation with Ted.

Ted Rutherford's Instructions

Ted is furious. He cannot believe how juvenile his neighbour was acting by putting a fence up along the driveway. It has made them the butt of neighbourhood jokes. While he and Scott are not on speaking terms, he has heard rumours from other neighbours that Scott plans to bring a lawsuit against him to prevent him from using the driveway to park his truck. Ted honestly did not know that Scott had a problem with his use of the driveway until Scott put the fence up. He wishes that Scott had just spoken with him about it. When Ted lost his job a year ago, he thought Scott would have been supportive of him starting his own business. It has not been easy. Ted is hoping that in a couple of years the business will grow to a point where he and Ashley will be able to buy a shop from which to run the business.

Ted does not want to move. He is happy with the neighbourhood and the location is crucial to his business. It is a hip area, and many of his customers are locals. Furthermore, the truck is a good advertisement when it is parked in the driveway, as people can see it when they drive down the road.

Ted knows that the driveway is mostly on Scott's property, however he has been using it continuously for over ten years without objection from Scott. Ted feels like this gives him the right to use the driveway, and he has heard that the law of adverse protection recognizes this right.

Ted has hired you, a paralegal, to assist him. You have discussed and ascertained the facts in his case. According to your obligations under the *Paralegal Rules of Conduct*, Rule 3, you are required to consider all possible options and advise your client on the appropriate course of action, including negotiation, alternative dispute resolution, and advocacy (Rule 3.01(4)). Specifically, Rule 3.02(12) requires a paralegal to "consider the use of alternative dispute resolution (ADR) when appropriate, inform the client of ADR options, and, if so instructed, take steps to pursue those options."

In addition, Rule 3.02(11) requires a paralegal to "advise and encourage a client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis" and to "discourage the client from commencing or continuing useless legal proceedings."

You recognize right away that this type of case should settle. There are simply too many consequences should it proceed to court. For starters, it would cost a lot of money, and going to court would potentially damage the neighbours' relationship beyond repair.

You recommend negotiation with Scott.

ADR Worksheet for Negotiation
Petals Flower Delivery Dispute: Paralegal

Your Role:

Name of Partner(s): Their Role(s):

Stage 1: Preparation Before the Negotiation

My Client's Position ~ What is my client seeking?

1. _____

My Client's Interests ~ Why is my client seeking what they are seeking? What they really care about (e.g., their wants, needs, concerns, hopes and fears).

1. _____
2. _____
3. _____
4. _____

Opposing Party's Position ~ What do I think they are seeking?

1. _____

Opposing Party's Interests ~ Why they are seeking what they are seeking? What I think they really care about (e.g., their wants, concerns, hopes and fears).

1. _____
2. _____
3. _____
4. _____

Options ~ Possible agreements that we might reach.

1. _____
2. _____
3. _____
4. _____
5. _____

Objective Criteria/Legitimacy/Proof ~ External standards or precedents that will help us to assess any options (e.g., market value, precedents, scientific judgment, professional standards, costs, what a court might decide, moral standards, expert opinions, equal treatment, or tradition). Be specific to *the facts of the scenario.*

1. _____
2. _____

Appendix B Continued

BATNA (Walk Away Alternative) – What will I recommend to my client if we walk away without agreement? What is our back up plan? What is our next step?

1 _____
2 _____
3 _____

Stage 2: Brainstorming During the Negotiation

1 Generate Ideas

2 Group Ideas Together

3 Assess the Ideas (pros/cons). Opinions

4 Evaluate Options using Objective Criteria

5 Choose the Best Ideas

Stage 3: After the Negotiation:

- Paralegals must draft and complete the settlement agreement together.
- Note: if no monetary amount is a term in the agreement, simply indicate n/a or "not applicable" in the area for the "sum of $."

Settlement Agreement

BETWEEN

_____ Plaintiff(s) or Party A

and

_____ Defendant(s) or Party B

Appendix B Continued

We have agreed to settle this action on the following terms:

(Name of party(ies)) shall pay to (Name of party(ies)) the sum of $ _____ as follows as full and final settlement of the claim, inclusive of interest and costs (provide terms of payment such as start date, frequency, amount, and duration below):

1.
2.
3.
4.

This claim (and Defendant's Claim, if any) is withdrawn.

If a party to these terms of settlement fails to comply, judgment in the terms of settlement may be obtained against that party on motion to the court or this action may continue as if there has been no settlement.

Provided that the terms of settlement are complied with, the parties above fully and finally release one another from all claims related to the facts and issues raised in this action.

The parties do not need to sign terms of settlement on the same day, but each must sign in the presence of his or her witness who signs a moment later. (For additional parties' signatures, attach a separate sheet in the below format.)

Date: _____, 20

Signature of party
Name of party
Signature of witness
Name of witness

Date: _____ 20

Signature of party
Name of party
Signature of witness
Name of witness

Source: Adapted from R. Fisher & D. Ertel, *Getting Ready to Negotiate: The Getting to Yes Workbook* (New York: Penguin, 1995).

Settlement Agreement in the ADR Worksheet adapted from the Ontario Superior Court of Justice, Small Claims Court Terms of Settlement

What Is Mediation?

7

Learning Outcomes

After reading this chapter, you will able to:

- Understand what is involved with the mediation process.
- Appreciate the potential benefits, as well as the limitations and risks, of mediation.
- Identify issues appropriate for mediation.
- Understand the role of the mediator, as well as the role of parties to the mediation.
- Recognize traits to look for when selecting a mediator.
- Identify the obligations for legal representatives who also work as a mediator.
- Distinguish between the different types of mediation.
- Recognize the different forums where mediation takes place.
- Apply the concepts from this chapter to a recurring conflict case scenario.

Introduction

mediation a process that occurs before a non-partisan third party who assists the parties in reaching a settlement by facilitating their negotiations with their joint consent

Similar to negotiation, **mediation** is a form of alternative dispute resolution (ADR) that uses collaborative discussions, in attempt to reach a resolution, instead of litigation arguments to obtain a verdict (as in the courtroom). In mediation, the parties work together, with the assistance of a mediator, to resolve a dispute rather than competing against each other in an effort to achieve victory. Because the mediation process is flexible enough to be used for many types of disputes, it is often a part of the settlement discussions for a wide range of legal matters. As advocates, legal representatives must recognize that mediation is distinctly different than appearing in court and requires a thorough understanding of the process and procedures.

This chapter describes the role of the mediator and the mediation process in a way that will highlight the unique nature of this type of ADR. Some of the possible benefits will be outlined, while also acknowledging potential limitations and risks when using mediation to resolve legal disputes.

Understanding Mediation

Mediation can be described as an ADR process that is used to resolve issues, outside of the courtroom, with the involvement of a neutral third party acting as a mediator. The disputants are active participants throughout the mediation session as they have the opportunity to express their own viewpoints and concerns while they attempt to recognize each other's perspective. Through joint problem-solving and with guidance from the mediator, the parties are able to develop creative options to potentially resolve their conflict. A decision or resolution is not imposed on the parties in the way that it is by a judge in the courtroom. Instead, the outcome is determined by the parties themselves. Mediation is typically considered to be a confidential and voluntary process, although it may be mandated in some situations.

Distinguishing Mediation from Negotiation

Mediation is sometimes referred to as an extension of the negotiation process because it maintains a similar format to negotiation—where the parties try to collaborate in order to come to an agreement. But it extends beyond negotiation by adding an impartial, unbiased mediator to facilitate the discussion and to control the process as the parties attempt to reach their resolution.

Like negotiation, mediation involves discussing the issues and developing potential options for settlement in an effort to arrive at a self-determined resolution. However, a distinction between the two processes is that mediation introduces an element of structure and more clearly defines the roles and responsibilities of everyone involved (e.g., the mediator, the disputants, and the legal representatives). By participating in a more structured process, discussions are less likely to break down due to ineffective communication skills or emotional outbursts. Instead, the mediator prescribes and demonstrates orderly, respectful communication and is able to interject, when needed, to calm escalating emotions. While many negotiated disputes will fail to achieve settlement due to ineffective communication and poor listening skills by the disputants, mediation presents an opportunity for more organized and effective discussions.

Mediation and negotiation are not necessarily mutually exclusive; instead, they are regularly used in conjunction with one another. It is not uncommon for parties to first attempt to resolve issues through negotiation prior to resorting to mediation. For example, a landlord and tenant may attempt to negotiate a change to the terms of a lease. If the parties are unable to reach an agreement through their discussions, they may opt to obtain legal advice and representation from a lawyer or paralegal. Often, the legal representatives will then make continued attempts at negotiation. If all efforts to resolve the matter through negotiation have not resulted in an agreement, the matter could then proceed to mediation. For example, in Ontario, the parties would attempt to resolve the matter at the Landlord and Tenant Board with assistance from a provincially appointed mediator.

Negotiation and mediation are used consecutively for many types of matters, including labour contract discussions. Union and management representatives will often spend several months bargaining as they attempt to negotiate the terms of a collective agreement. As a lockout or strike deadline approaches with no settlement in sight, a mediator can be retained to assist the parties in working through the issues that remain in dispute. As a further example, the negotiation to mediation continuum can be utilized for other employment-related matters (e.g., wrongful dismissal, constructive dismissal). In a discussion of the role of mediation, Bennett indicates that mediation lends itself particularly well to workplace conflict situations where the parties have become entrenched in their positions.[1] When parties have become personally invested and locked into their positions, they may find it difficult to have a productive discussion on their own. However, shifting from negotiation to mediation allows the mediator to encourage the parties to look beyond their personal positions in order to unveil their underlying interests. When participating in this type of interest-based problem solving, parties tend to learn more about the other side's perspective and concerns. Such discussions will often be helpful in moving the parties toward settlement.

Forums for Mediation

In their everyday lives, many people will unintentionally take on an ad hoc role of the mediator by helping friends, relatives, or co-workers resolve an issue. This is done instinctively without defining or referring to the process as a mediation session. Parents will mediate conflicts that arise between their children, or a corporate manager will help two staff members work through a disagreement. In these examples, mediation is loosely structured with improvised participation.

Mediation can take varying degrees of formality as it addresses a range of issues in different forums. Legal professionals may appear at a number of forums for mediation including: community mediation, government processes, court processes, or opt-in mediation.

- *Community mediation*: Many jurisdictions have community mediation services available for a minimal charge, a donation or as a free service. The Ontario Community Mediation Coalition supports community mediation services that provide assistance in resolving neighbour conflicts, landlord and tenant issues, interpersonal problems, and minor commercial conflicts. The mediations are typically conducted by volunteer mediators.

1 T Bennett, "The Role of Mediation: A Critical Analysis of the Changing Nature of Dispute Resolution in the Workplace" (2012) 41:4 Indus LJ 479.

- *Government processes:* Several government agencies have mediation built into their complaint and investigation processes (e.g., the Information and Privacy Commissioner of Ontario, the British Columbia Human Rights Tribunal, and the Landlord and Tenant Board). The mediators are government employees who are trained and experienced in mediation. There is no additional charge for the parties to participate in the mediation.
- *Court processes:* Various levels of court have made attempts to introduce mediation as part of the court process. Some small claims courts have started mediation pilot projects or have partnered with local law schools to allow student mediators to support parties who would like to resolve matters outside of the courtroom. Further, mediation may be a required step in the litigation process in some provinces. For example, Ontario utilizes mandatory mediation for case-managed civil, non-family actions. Depending on the level of court and the complexity of the matter, the mediators could be private mediators, roster mediators, volunteers, or government employees.
- *Opt-in mediation:* Even if mediation is not formally built into the process, the parties have the option of hiring a mediator in an effort to try to settle their matter without going to court. When hiring a mediator, the parties are responsible for splitting the mediator's fees and any additional costs associated with the mediation session (e.g., rental of a venue).

The Mediator

The Mediator's Role

The mediator is a neutral third party. Their neutrality is key to gaining credibility and trust from the disputants. Parties who have faith in their mediator are more likely to actively participate during the mediation session. By refraining from taking sides during the mediation, the mediator plays a prominent role in prompting the discussion of underlying interests and potential options for settlement.

In mediation, both sides tell their story to the mediator. The mediator is non-judgmental, does not have a relationship with either side, and has no stake in the outcome. Sharing information, with a mediator present, provides a safe space for the parties to freely express themselves. While each party speaks, the mediator's job is to actively listen while trying to understand, empathize, and support. The mediator will clarify and interject, when necessary, as the stories unfold and as the parties become more aware of the opposing side's viewpoint.

In guiding the parties toward settlement, mediators will introduce an element of structure to the process. By adding a layer of formality to this otherwise informal discussion, the mediator takes control of the process. It is often stated that the parties are in control of the resolution and the mediator is in control of the process itself. In order to maintain control over the process, a mediator will decide when each party should speak, will establish **ground rules**, and will set the agenda by determining the issues that need to be discussed and how much time will be allocated to each issue. By introducing this more structured environment, the intention is to balance power and ensure fairness. This facilitation by the mediator allows the parties to focus on the interests and issues in dispute and not on the positi

ground rules
rules introduced by the mediator at the outset of mediation to encourage the parties to discuss their conflict in an appropriate manner

The mediator establishes ground rules at the outset of the discussions and reinforces these rules throughout the mediation session. For example, a common ground rule in mediation is "no interruptions." It is based on the premise that each side should have an opportunity to fully explain their story. There is often a need for mediators to remind parties of this rule. While each side may commence the mediation with the intention of allowing the other side to speak without interruption, it can be difficult to abide by this rule. For example, if a party hears the other side make a statement that they believe to be untrue or inaccurate, the temptation is to speak up, even if it means interrupting. A mediator will often give the parties and pen and a piece of paper to jot down their ideas as a way to minimize potential interruptions. A mediator must always be ready to intervene when necessary or call for a **private caucus**, if appropriate. See Chapter 8 for a discussion of the private caucus and common ground rules in mediation.

private caucus
a private meeting with the mediator and one party without the other side present

A mediator uses effective communication and listening skills to walk the parties through the principled negotiation process as outlined by Fisher and Ury in *Getting to Yes*, as discussed in Chapter 5.[2] The mediator will begin by asking for opening statements from each side in order to identify and convey each party's position. While listening to the opening statements, the mediator will typically employ active listening strategies by maintaining eye contact, using minimal encouragers to encourage the party to continue without interruption, paraphrasing where appropriate, and summarizing when each party finishes with their opening statement. All of these strategies will help everyone around the table to properly understand each party's position. A mediator will also use a range of questioning techniques in an effort to determine the underlying interests that have caused the parties to arrive at to their positions.

The mediator will attempt to keep the parties focused on the issues at hand without verbally attacking each other (as discussed in Chapter 5, separating the people from the problem). Mediation is not the place to make accusations or unnecessary references to past behaviours. Instead, the mediator will try to keep the parties focused on the issue that is currently on the table and facilitate the discussions as they figure out a plan for moving forward and leaving the past issues behind. The past cannot be changed, but the future between the parties can certainly be improved.

When all of the relevant information has been shared, the mediator will take the parties through an option-generation stage. Parties will typically be asked to brainstorm different solutions. Instead of stopping with the first idea that seems to be reasonable, the mediator will encourage parties to continue to develop as many options as possible. When a list is established, the mediator will support the parties as they assess which options are most appropriate and should be pursued further.

The involvement and participation of the mediator varies in different formats of mediation. Some mediators are more facilitative in nature, while others are more evaluative. In its truest form, mediation is a facilitative process, in that, it helps or facilitates the parties throughout their discussions and guides them towards a resolution. In **facilitative mediation**, the mediator does not provide legal information or advice, does not generate options for the parties, does not take sides, and does not render a verdict. Instead, the mediator focuses upon helping the disputants to work through the resolution process.

facilitative m
a form of media
which the medi
neutral by assis
guiding the pa
to their own r

While the role of the mediator may sound simplistic and straightforward, it can be extremely challenging for a mediator to refrain from taking sides. As human beings, we continually assess situations and weigh the pros and cons. We regularly look at an

2 R Fisher, R Ury [illegible] Giving In (New York: Penguin, 1981).

issue and decide who is right and who is wrong. We assess who should win and who should lose. However, the mediator must refrain from doing so. A facilitative mediator's job is to remain completely neutral as they guide the parties towards solutions that may be appropriate for their situation.

evaluative mediation a form of mediation in which the mediator evaluates the strengths and weaknesses of each party's case

In contrast, the mediator takes on a different role in **evaluative mediation**. The mediator will still assist and guide the parties through the mediation process, but the mediator will also give an opinion or an assessment of the strengths and weaknesses of each party's case. Mediators will stop short of actually providing legal advice, but their preferences are typically expressed to the parties. Settlement conferences in small claims court, sometimes considered to be a form of evaluative mediation, are effective because the deputy judge will evaluate the case and encourage settlement. For example, the deputy judge may suggest an appropriate settlement amount if there does not seem to be a strong case for trial, but their suggestion is not binding on the parties. Evaluative mediators adopt a similar style as the deputy judges by pointing out the strengths and weaknesses of the case, outlining the risks and benefits of going to trial, and suggesting a recommended settlement amount.

In clarifying the role of the mediator, Ewart et al suggest that a mediator should see their role in terms of:

1. assisting in establishing a negotiating atmosphere that is open and trusting, conducive to problem solving and positive attitudes;
2. helping plan the steps to be undertaken throughout the process;
3. helping frame the issues to be dealt with and helping parties to prioritize those issues;
4. helping parties explore their underling desires, hopes, fears and concerns;
5. promoting problem solving on the basis of the parties' own sharpening awareness of the facts and of their own interests;
6. enabling the parties to save face where possible;
7. helping the parties develop skills, such as active listening, that will permanently enhance their ability to problem-solve; and
8. asking the disputing parties the kids of questions that will enable them to come to grips with their own interests and solutions.[3]

3 C Ewart et al, *Choices in Approaching Conflict: Principles and Practice of Dispute Resolution*, 2nd ed (Toronto: Emond, 2019) at 59

PRACTICE TIP

Learning About Your Mediator's Style

It is prudent for legal professionals to conduct research about their mediator prior to attending a mediation session. Try to determine if the mediator prefers a facilitative or evaluative approach. If the mediator is known to take a facilitative approach, advise the client that the mediation will involve a lot of discussing, brainstorming, and option generating. If the mediator's style is more evaluative, the legal representative should inform their client that the mediator will provide an assessment of the strengths of the case. However, clients should be assured that this assessment is only one mediator's opinion of the case and that they are not required to agree with the mediator's input.

In addition to researching the mediator's style, it is recommended that representatives do their due diligence and investigate the mediator's training and experience.

Mediator Requirements

Canada currently does not require any specific, formal training or qualifications to self-designate as a mediator. Presently, anyone can offer mediation services since it is not a regulated profession and because there are no licensing requirements to act as a mediator. However, training is necessary to be successful in the field from both a knowledge and skills perspective as well as from a business promotion perspective. The best marketing strategy for mediators is referrals, and it would be difficult for someone without training or experience to recruit clients and promote their services. A number of Canadian organizations train mediators or keep a membership registry, but there is no actual requirement to attend training or become a member. Some organizations offer mediation designations (e.g., certified mediator, chartered mediator, and accredited mediator) that can be obtained, but again, these designations are not mandatory to work as a mediator. See Chapter 12 for additional information about mediation training.

Paralegals and lawyers are permitted to take on work as a mediator, but before doing so, they should review the requirements of their provincial law society. For example, Rule 2.01(6) of the *Paralegal Rules of Conduct* states,

> A paralegal who acts as a mediator shall, at the outset of the mediation, ensure that the parties to it understand fully that the paralegal is not acting as a representative for either party but, as mediator, is acting to assist the parties to resolve the issues in dispute.[4]

This rule is intended to prevent unrepresented parties from falsely believing that their legal interests are being protected by the mediator. It also limits the liability of the mediator.

4 Law Society of Ontario, *Paralegal Rules of Conduct* (1 October 2014; amendments current to 24 February 2022), online: <https://lso.ca/about-lso/legislation-rules/paralegal-rules-of-conduct>. For the most up-to-date material, please visit the website referenced in this footnote.

Licensees who want to provide mediation services should review the rules of conduct from their provincial law society. Specifically, there is a prohibition from acting as both legal representative and mediator for the same matter because it would create a conflict of interest and interfere with mediator neutrality. Additionally, there are rules relating to confidentiality that would arise if a mediator was retained for a matter where they had previously provided legal representation. Further, there may be rules pertaining to outside interests (i.e., anyone who engages in another business while providing legal services). Licensees cannot allow an outside interest, such as working as a mediator, to interfere with their legal services or impair their independent judgment on behalf of a client.

There are times when the parties will be assigned a mediator. For example, when mediation is part of a government resolution process, staff mediators will typically be assigned (e.g., Ontario Human Rights Commission). In other situations, parties, or their representatives, may have an opportunity to select a mediator (e.g., the Ontario Mandatory Mediation Program allows parties to select a mediator from an approved roster of mediators). If there is an opportunity to choose the mediator, in addition to researching the mediator's training, experience, and style, representatives are encouraged to consider which personality traits they feel are important in a mediator.

TRAITS TO LOOK FOR IN A MEDIATOR

An article in *The Lawyers Weekly* outlined the following seven important traits to look for in a mediator:

- Knowledge: A mediator should be well versed in the pertinent law and be able to assess a party's legal position (Note: this is important for evaluative mediation, but not necessarily for facilitative mediation).
- Credibility: A mediator should have some relevant experience to gain credibility with the parties.
- Tenacity: If the mediator is not indomitable, the opportunity for settlement will be lost. Highly effective mediators keep the parties talking about settlement solutions and push through impasses.
- Persuasion: An effective mediator will become actively involved in the negotiations and lean on the parties to work towards settlement.
- Discretion: As a neutral intermediary, the mediator must refrain from commentary that will drive a wedge between the parties and cause them to become more entrenched in their positions and less willing to negotiate.
- Intuition: A good mediator will wade through legal positioning and focus on a party's true interests.
- Creativity: Effective mediators will encourage parties to develop creative solutions to keep the parties at the settlement table.

Source: Adapted from D Howden, "Seven Traits of Highly Effective Mediators," *The Lawyers Weekly* 34:37 (13 February 2015) 12.

Why Is Mediation Effective?

In an ideal society, we would not need the intervention of a mediator; the parties in conflict would be able to effectively resolve disputes on their own without any assistance. However, we know that this is not always the case. Conflict can trigger strong emotions, resentment, and even retaliation. Many people are not on their best behaviour during a conflict situation and do not act as rationally as they would in a regular discussion. When people are extremely angry or upset, their emotions can interfere with how they are able to express themselves to the person who has seemingly triggered these feelings. When dealing with conflict, we often see people cry, raise their voice, interrupt, or terminate the discussion (e.g., hang up the phone or leave the room). In a mediation session, the mediator acts as a referee, making sure that all participants follow the rules and procedures of mediation while providing a forum to voice concerns and raise issues.

Most people do not have highly developed conflict resolution skills. This can be partly attributed to their upbringing. Parker writes,

> Children from a young age learn how to respond to conflicts by observing the adults in their lives. Negative experiences people have had with conflict are often reinforced in the media, where it often appears as if the only effective way to address conflict is to respond with violence.[5]

A lack of appropriate role modelling can prove to be problematic for parties who are trying to resolve a legal dispute. Many disputants do not have the ability to engage in true problem-solving because of the anger and emotions that they have built up that can emerge when discussing contentious issues. For example, when one party uses a harsh tone, it is common for the other party to respond in a similar manner. Or, when one party lashes out with a threat, the other party typically retaliates with an aggressive comeback.

However, since mediators are trained in effective communication and have highly developed conflict resolution skills, they can showcase their skills and, in doing so, model appropriate behaviour. Throughout a mediation session, parties typically respond to a mediator's behaviour by mirroring such behaviour. A mediator who is behaving respectfully and appropriately, while actively listening to all participants, indirectly encourages the parties to behave the same way.

The mere presence of a mediator changes the atmosphere in the room and can be effective in encouraging the disputants to modify their own behaviour. Human nature seems to dictate that people tend to behave differently when a third party is present. Parties will try to be more reasonable than their opponent and attempt to appear as the party who is behaving in a more socially desirable manner. Although the mediator is not a decision-maker, the parties will usually try to win over the mediator by trying to convince them that they are right and that their opponent is in the wrong. However, even if the mediator does have a preference, mediators will typically refrain from showing any bias or preference. Their focus is on being perceived as neutral.

Legal disputes can evoke anger and resentment between disputants. Some parties have difficulty even being in the same room with the person who is alleged to have

5 C Parker, "Practicing Conflict Resolution and Cultural Responsveness Within Interdisciplinary Contexts: A Study of Community Service Practitioners" (2015) 32:3 Conflict Resol Q 325 at 335.

caused their legal woes. Having the parties communicate directly with each other can be problematic and, at times, may be counterproductive. However, because the disputants are angry with each other, and not with the mediator, they should be able to effectively express themselves directly to the mediator. As an example, when someone truly feels wronged by another person, they might revert to childlike behaviours by refusing to make eye contact with this person, displaying defensive body language, and consciously or unconsciously trying to block out everything that this person says. Because the parties are not angry with the mediator, it presents an opportunity for the mediator to be the intended recipient for the party's statements. For instance, when Party A describes how they were wronged, Party B may have difficulty listening to what is being described. However, when the mediator summarizes why Party A feels wronged, Party B will be more likely to accept and listen to the words that were stated by the mediator than if the words were stated directly by the opposing party.

Benefits of Mediation

Adjudicative processes tend to focus on financial compensation for the successful litigant, but rarely lead to creative and customized judgments. By contrast, mediation allows for more practical and tailored resolution opportunities. Not every issue can be resolved with money. Neighbours in dispute have an ongoing relationship in the sense that they will still have to reside in close proximity to each other in the same community. The results achieved through litigation may destroy the neighbourly relationship, while mediation can focus on creative solutions that could actually strengthen this neighbour-to-neighbour relationship. Mediation can be a **restorative** or even **transformative process** that allows for re-building and re-structuring relationships.

restorative process
a process that strengthens the relationships between the parties by addressing the needs of participants and attempting to repair any harm

transformative process
a process that strives to empower each of the parties and improve their relationship

Mediation allows the parties to take control of the resolution. Weldon writes,

> What distinguishes all types of mediation from adjudication is the foundational principle of party self-determination. According to this principle, it is the parties themselves who should be responsible for making any decisions affecting them, assisted by a neutral third-party without decision-making power.[6]

Mediation utilizes a common-sense approach. In mediation, the people involved in the dispute, and their legal representatives, are the same people who decide how it will be resolved. People like to be involved in the decisions that affect their lives. The actual disputants care about the dispute, the outcome, and how it is resolved more than an adjudicator ever could because of the impact that the outcome will have on their day-to-day lives. While a judge may be able to decide who is right and who is wrong in a given situation, the judge's involvement typically ends with a verdict. The disputants have to live with the outcome and meet the requirements or pay the debt. It makes sense that, in mediation, the people who are most impacted by the dispute are the ones who are able to exercise decision-making authority.

The self-empowering nature of mediation makes it appealing to parties who want to take control of their legal issues. While it may be faster and easier to solve a problem for someone else or to tell them what to do in a specific instance, mediation allows the disputants to gain skill and confidence in solving their own problems, which can lead to the possibility that they will be better equipped to solve future issues that may arise.

Typically, mediation is less formal and less daunting than going to court. Instead of being held in an intimidating courtroom, mediation sessions can take place in a meeting room or boardroom. Parties sit across the table from one another and discuss the issues that they are going through. In some cases, the parties are able to bring a friend or family member to act as a support person throughout the session. The informality of mediation makes it appealing for people who are nervous about attending court or about speaking in public. They may feel more at ease speaking in front of a much smaller audience at mediation. And because mediation sessions are closed to the public, it can be comforting for clients to deal with their personal matters in a private setting.

Mediation can be customized to accommodate the needs of the parties. Most mediators will attempt to schedule a mediation session around the availability of the parties and their representatives. Since it is typically faster to schedule a mediation session than it is to be assigned a court date, matters can be resolved more quickly and at the convenience of the parties.

Another important benefit of mediation is that it is highly effective. A number of research studies have consistently found that mediation has a settlement rate of 75 to 95 percent. With at least three-quarters of the matters that go to mediation being resolved, it is clear that mediation has been an effective process for a significant number of conflicting parties.

Limitations and Potential Risks of Mediation

While there are many benefits to mediation, the process is not without its limitations. Mediation works well when the parties buy into mediation and have opted to participate. In cases where there is forced participation in mediation, the parties may simply go through the motions with no intention of trying to resolve the matter. For example, some parties may see participation in mandatory mediation as simply getting one step closer to the courtroom, and they may have no intention of engaging in realistic problem-solving at the mediation stage. This limits the effectiveness of mediation because the parties are only attending the mediation in order to move the claim into the next stage.

When mediation is used to effectively resolve a dispute, there can be substantial cost and time savings for the parties involved, making it a very cost-effective process. However, when resolution is not achieved through mediation, it adds an additional layer of expense and an added time commitment for the parties. Since mediation never guarantees a resolution or specific outcome, there is some element of risk and expense in adding an additional step to the litigation process.

Mediation can be used for a wide range of disputes, but it is not suitable for all types of conflict. Some of the situations where mediation may not be appropriate include the following:

- *Extended conflict*: When there is a long history of extended conflict, the dispute may be beyond the scope of mediation. For example, the legendary three-decade feud between the Hatfields and the McCoys would likely not be appropriate for mediation. There is some uncertainty about what the initial dispute was about, yet the families continued to fight for several generations. In this case, the conflict was more a result of the ongoing

6 JP Weldon, "Transformative Mediation: Putting Party Self-Determination into Practice" (2012) 21:1 Can Arbit and Med J 30 at 30.

hostile relationship between the families than it was about the substance of the original dispute. A conflict of this magnitude would be very difficult to resolve through a relatively short and informal mediation session.

- *Power imbalances/history of violence*: Matters with vulnerable parties or situations where the parties have extreme differentials in power, may not be well-suited for mediation. Mediators will make an effort to balance power when it is reasonable to do so (e.g., by ensuring that both parties have equal time to speak or by going into private caucus if one of the parties is dominating the discussion), but there are limits to a mediator's ability to balance power. Matters that have a history of domestic violence, restraining orders, or criminal charges tend not to be suitable for mediation (with some exceptions) because of the risk involved. Mediation sessions are held in private, informal meeting rooms and do not have the same protection that a public courtroom with court security guards has to offer.
- *Social justice issues*: In order to draw attention to social justice issues and causes, it may be necessary to deal with these types of contentious issues in a public forum instead of in a private mediation. Parties who want to promote change to a law would not want to be bound by a confidentiality agreement and a settlement made behind closed doors (e.g., an environmental advocate would want to bring the matter to the public's attention by setting a precedent in court and attracting media attention, which they would be unable to do through mediation).
- *Untrained or inexperienced mediators*: Because mediation is not a regulated profession, there can be a concern relating to the training and experience of mediators. A mediator who does not have knowledge of, or control over, the mediation process may be ineffective in guiding the parties toward a resolution. A mediator does not necessarily need to be an expert in the law (unless they are conducting an evaluative mediation), but does need to be an expert in the mediation process itself.
- *Reluctant legal representatives*: Law schools and paralegal programs now train lawyers and paralegals in ADR, but this has not always been the case. If the opposing legal representative is unfamiliar with mediation or does not seem to understand the value of the ADR process, it may be difficult to encourage settlement.
- *Reluctant parties*: Some parties are determined to "have their day in court" and are not willing to collaborate and work together in order to come to a resolution. Parties who are fixated on going to trial are less likely to discuss the issues in good faith, unlikely to provide full disclosure, and unwilling to engage in true problem-solving during mediation.
- *Too early in the process*: Mediation is seen as an opportunity for early resolution, but it is effective only when all the essential information is available. If the dispute is a complicated matter that requires expert evidence or medical reports, the mediation should not take place until it is possible to make a fully informed recommendation to the client. For instance, if the mediation is required to be conducted within 90 days of the filing of the first defence, there might not be enough time to consult with the relevant experts and specialists prior to the mediation session.

[illegible] CASE STUDY

Mediation

Angela's paralegal was frustrated with the opposing paralegal's behaviour during their attempt at negotiation. He did not feel as though Mary and Leo's paralegal was taking the matter seriously: the opposing paralegal did not seem prepared and made a lot of inaccurate statements. As such, Angela's paralegal indicated that there would not be much point in continuing to negotiate. Angela started to cry because she felt overwhelmed by the whole situation. She needs some compensation, but she cannot afford to pay for a legal representative to go to court and she knows that she is not competent to deal with the matter on her own.

Angela's paralegal gave her the phone number for a local community mediation clinic that provides free mediation services. He explained the mediation process to Angela. The paralegal also told her that he would be away for the next week, but that she could attend on her own. He assured her that he could be available to review a settlement agreement, if needed.

When Angela called and explained the situation, the community mediation clinic was happy to take on the matter. They contacted Mary and scheduled a mediation session for the following week. The mediator informed Angela that Mary was receptive to the idea of mediation, but that Leo had insisted on attending the session with his wife. In order to feel more comfortable and to avoid feeling out-numbered, Angela asked her friend, Ted, to attend the mediation with her.

The mediator suggested that Angela speak first. The mediator asked Angela to explain the significance of her figure skates and why they had sentimental value to her. Angela explained that they had been a gift from her father who has since passed away. This was hard for Angela to talk about and she became quite emotional, but it helped Mary and Leo to understand how much the skates meant to her. Angela also indicated that she felt as though Mary knew (or should have known) about the leaking closet and therefore had a duty to warn her about the situation.

Leo spoke on behalf of himself and Mary. He indicated that they did not know that the pipe would leak. He admitted that there were past problems but believed that it had been fixed and therefore did not feel the obligation to disclose the previous issue. He also mentioned that if the skates were that important to Angela, she should have found a better place to store them. Angela immediately became defensive about Leo's statement and the discussions nearly broke down. The mediator suggested that they take a short break to allow Angela to have a discussion with her friend Ted, who was there as a support person. Ted had not taken part in any of the discussions, but played an important role in helping Angela to calm down when they had a private chat.

As Leo was finishing his opening statement, he received an emergency call from work and had to immediately leave the mediation session. Angela and Mary tried to continue to work towards a resolution and they did make a lot of progress, but Mary did not feel that she could make an offer without first checking with Leo. They agreed to schedule a follow up mediation session a few days later. The parties also agreed to conduct some further research and look into what portion of the damage could be covered by insurance.

The day after the mediation, Angela contacted her former paralegal and advised him that she felt as through they would be able to settle it at the next mediation date. The paralegal indicated that he was available for the next date and offered to come with her to the next mediation session—pro bono—because he was considering expanding his paralegal practice to include ADR services and would like to be involved in a mediation.

Discussion of Scenario

- Access to Justice: Angela felt overwhelmed by this dispute because the attempt to negotiate failed, she did not want to represent herself, she could not afford to hire a representative and she was not sure where to turn. This is a common problem in our court system. By consulting with a paralegal and using consecutive ADR processes, it expanded her options and provided greater access to justice.

- *Community Mediation*: Community mediation services provide free (or low cost) mediation services to the public for minor disputes. Angela was able to attend a mediation session without the need to hire a legal representative (although representatives are welcome to attend community mediation), which provided her with a cost-effective option.
- *Support Person*: Most mediators will allow the parties to bring a support person. Having Ted attend the mediation with Angela helped to balance the power dynamics (i.e., it did not feel like two people against one person) and allowed Angela to turn to Ted for emotional support when needed (to be discussed further in Chapter 8, Recurring Case Study).
- *Focus on Interests*: The mediator created an opportunity to discuss more than positions and helped the parties to focus on their underlying interests. This helped Mary and Leo to understand why the skates were so important to Angela.
- *Blaming*: Using blaming language is not appropriate in mediation and it often causes disputes to escalate. When Leo blamed Angela for the damage, she became defensive and discussions almost broke down.
- *Authority to Settle*: The parties who attend mediation should have the authority to settle the matter. Since Leo was not available and Mary was not comfortable settling the matter without consulting him, it was appropriate to schedule a follow-up mediation session.

CHAPTER SUMMARY

Mediation is a form of ADR that seeks to resolve a dispute and avoid litigating in the courtroom. While it is similar to negotiation in some ways, mediation introduces a neutral third party, as a mediator, to assist with the settlement discussions. The mediator facilitates discussions between the parties by introducing ground rules and adding some structure to the process. Mediators will also encourage the parties to brainstorm possible options to settle the dispute.

In situations when a mediator can be selected by the parties and their representatives, there are some key requirements and traits to look for in a mediator. While cost savings and high rates of settlement are recognized as benefits of mediation, the process is not without its limitations and concerns. When considering mediation for a client, it is important to ensure that the subject matter is appropriate for mediation, confirm that the legal representative and opposing parties are willing to participate, and caution the client that there is no guarantee of settlement.

Statistics routinely indicate that mediation is highly successful in achieving effective resolution and in client satisfaction. Understanding the mediation process and knowing how to properly support a client in mediation is essential for all legal professionals.

KEY TERMS

evaluative mediation, **164**
facilitative mediation, **163**
ground rules, **162**
mediation, **160**
private caucus, **163**
restorative process, **168**
transformative process, **168**

REVIEW QUESTIONS

1. Which statement is applicable to both negotiation and mediation?
   a. The parties try to collaborate in order to come to an agreement.
   b. The dispute is facilitated by a neutral third party.
   c. There are clearly defined roles for the participants.
   d. A resolution is guaranteed.
2. Which responsibility is part of the mediator's role in a facilitative mediation?
   a. To provide legal advice.
   b. To suggest options for settlement.
   c. To render a verdict.
   d. To assist the parties in working through the issues.
3. Shannon attended a mediation to resolve an issue with a contractor. Both sides explained their position and interests. Before generating options, the mediator pointed out the strengths and weaknesses of the case. Shannon declined a settlement offer because the mediator had indicated that Shannon had the stronger case. How do you know that this was an evaluative form of mediation as opposed to facilitative?
   a. Both sides had an opportunity to explain their position and interests.
   b. The parties had an opportunity to generate options.
   c. The mediator pointed out the strengths and weaknesses of the case.
   d. Shannon had the opportunity to decline a settlement offer.
4. Which of the following is NOT a benefit of mediation?
   a. It acts as a reality test.
   b. It is less expensive.
   c. It guarantees a settlement.
   d. It personalizes the process.

Questions 5 and 6 refer to the following scenario:
Percy is a paralegal with a firm specializing in landlord–tenant matters. His client, Melanie, is a single mother of two teenaged children. Melanie's landlord has applied for early termination of her tenancy on the grounds that she has substantially interfered with the reasonable enjoyment of the residential complex by other tenants. The landlord claims that the teenagers are left unsupervised on a regular basis and that they play loud music, slam doors, scream obscenities, and have loud parties. There have been a number of complaints from other tenants, who are willing to testify against Melanie and her children. Melanie admits that her children can be "a little wild" when she is out working two jobs, but she doesn't have a choice. The Landlord and Tenant Board has a mediation scheduled in two weeks.

5. Melanie indicates that she would like to continue living in the building, but she does not want her neighbours to learn about what is discussed in the mediation. Is mediation appropriate to resolve this dispute?
   a. Yes, because mediation is appropriate when a continuing relationship is sought.
   b. No, because a public decision is important in this matter.
   c. Yes, because mediation would allow the other tenants to testify against Melanie and her children.
   d. No, because the mediator's binding decision may not meet Melanie's interests.
6. Melanie is a little unclear about what role the mediator will play in the mediation session. How should Percy explain the mediator's role to his client?
   a. To facilitate the discussion so that the parties can resolve their own issues.
   b. To impose a settlement.
   c. To create a precedent that will be followed in future mediations.
   d. To create an environment that is very similar to a courtroom.

DISCUSSION QUESTIONS

1 List five traits to look for when selecting a mediator

2 In accordance with the requirements under the *Paralegal Rules of Conduct*, what are paralegals who act as a mediator required to explain to the parties at mediation?

Questions 3 through 10 refer to the following scenario

Farah, a woman in her mid-20s, went to a local barber shop to get a haircut. When she entered the barber shop, the three male barbers refused to cut her hair. Farah explained that the barber shop was recommended to her by one of its regular customers and that she wanted her hair to be cut in a similar style to his. She indicated that she wanted a standard businessman short haircut that involved using clippers instead of scissors and that styling would not be necessary. Still, all three barbers declined to cut her hair and asked her to leave the barber shop.

3 Based on the information provided so far, explain the position of each party.

4 Speculate on what Farah's interests might be in this scenario.

Scenario (continued):

Farah was very upset by the way she was treated. She made an inquiry to the Mediation and Investigation Branch of the Human Rights Commission of Ontario. The Human Rights Commission recommended mediation to resolve this matter.

5. Explain why mediation is an appropriate process to deal with this situation.
6. What are the possible concerns associated with using mediation to resolve this dispute?

Scenario (continued):

At mediation, the owner of the barber shop explains that he and the other barbers belong to a religion that prohibits them from touching the hair of any woman outside of their immediate family. Farah acknowledges his dilemma and indicates that she was not seeking any financial compensation, but would still like to address the issue of women not being able to use the services of the barber shop.

7. Considering this new information, explain the interests of both parties.
8. What are the objective criteria in this case?
9. Develop a possible option that could satisfy the interests of each party.
10. Do you think mediation would be better than adjudication to resolve this matter? Explain why.

Note: This scenario is based on Tim Alamenciak, "Woman Denied Haircut Goes to Human Rights Tribunal of Ontario," *Toronto Star* (15 November 2012), online: <https://www.thestar.com/news/gta/2012/11/15/woman_denied_haircut_goes_to_human_rights_tribunal_of_ontario.html>.

EXERCISES

1. Mediation Role Play: Hair Salon (see Appendix A)
2. Mediation Role Play: Multi-Party Roommate (see Appendix B)

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Appendix A Role Play: Hair Salon Mediation

Type: Mediation Role Play

Participants: One or two mediators; two parties; no representatives

Level of Difficulty: Medium

Time: Set aside approximately 45 minutes for this activity, including 5–10 minutes to read the roles, 15–20 minutes for the mediation, and 10–15 minutes for the debrief.

Objectives

- Introduce students to the process for mediation.
- Allow students to practise working with a mediator.
- Demonstrate how some disputes are better resolved through mediation than litigation.

Preparation

- Divide the students into groups of three or four (if there are four students in a group, two students should co-mediate).
- Assign a role to each student.
- Ask students to read their roles.
- The parties should complete the ADR Worksheet for Mediation (Party).
- The mediator should complete the ADR Worksheet for Mediation (Mediator).

Debriefing with Students

1. Mediators, what was it like to be a mediator for this dispute?
2. Mediators, did you find it difficult to maintain control of the process during the mediation?
3. Parties, what was it like to work with a mediator?
4. What was the resolution?
5. Why this was a good matter to go to mediation instead of court?
6. How successful do you think this matter would have been if the two parties tried to negotiate on their own without the assistance of a mediator?
7. What did you learn from this mediation that will help you in your future practice as a paralegal?

Hair Salon Dispute

Role for the Mediator

You are a volunteer mediator with a community mediation service. You do not have many details about this matter, but you do know that the plaintiff is very upset about a recent trip to a local salon. There was damage to their hair and the salon is not willing to accept responsibility for it.

Both parties have agreed to try mediation before going to small claims court.

Role for the Actor/Actress

You are an aspiring actor/actress. You've had several small jobs in local theatre and have just landed your first big break: a lead role in *Spring Awakening*, playing in downtown Toronto. You will be making your debut in less than two weeks, and while you are nervous, you are also very excited. All the media will be there on opening night, and you have heard that New York agents will be there looking for new talent. It is a dream come true.

In order to look your best for the performance, you decided to go to a local salon that many of your friends have recommended. The salon was very expensive, but it had a good reputation so you decided it was worth it. You wanted a simple haircut and colouring, but somehow your hair turned pink! It looked fine when you left the salon, but after the first time you washed it, you noticed the dramatic colour change.

You have since had to go to another salon and incur additional expenses to have your hair dyed again. However, all the harsh chemicals have caused it to start falling out in clumps.

You are considering suing the salon for thousands of dollars in small claims court, but have agreed to attend mediation in hopes of arriving at a settlement.

Role for the Salon Owner

You are the owner of a hair salon that has recently opened in downtown Toronto. You have been very fortunate—the salon has had rave reviews and the local buzz is that it is the place to go for "anyone who is anyone." When celebrities come to town, your salon is their first pick!

A recent customer is threatening to sue the salon for thousands of dollars. The customer claims that the salon has seriously damaged their hair. You have no idea how this is possible. There have been no other complaints, your staff are highly trained, and you use only the highest-quality products. However, you agreed to attend a mediation session because you know that a legal action would bring unwanted attention to the salon and could damage its stellar reputation.

You are curious about the type of damage that the customer has suffered and you will consider providing some type of compensation. However, despite your recent success with the salon, you are a little short on money—it is expensive to start a business, and most of your income is tied up with operating expenses and new business loans.

Since you would like to avoid small claims court, you have agreed to attend mediation in hopes of arriving at a settlement.

ADR Worksheet for Mediation*
Hair Salon Dispute: Party

My Position – What am I seeking?

1. _____

My Interests – Why am I seeking what I am seeking? What I really care about (i.e., my wants, needs, concerns, hopes and fears)

1. _____
2. _____
3. _____
4. _____

Opposing Party's Position – What do I think they are seeking?

1. _____

Opposing Party's Interests – Why are they seeking what they are seeking? What I think they really care about (i.e., their wants, concerns, hopes and fears).

1. _____
2. _____
3. _____
4. _____

Options – Possible agreements that we might reach.

1. _____
2. _____
3. _____
4. _____
5. _____

Objective Criteria/Legitimacy/Proof – External standards or precedents that will help us to assess any options (e.g., market value, precedents, scientific judgment, professional standards, costs, what a court might decide, moral standards, expert opinions, equal treatment, or tradition). *Be specific to the scenario.*

1. _____
2. _____

BATNA (Walk Away Alternative) – What can I do if I walk away without agreement? What is my back up plan? What is my next step?

1. _____
2. _____
3. _____

*Adapted from R. Fisher & D. Ertel, *Getting Ready to Negotiate: The Getting to Yes Workbook* (New York: Penguin, 1995).

ADR Worksheet for Mediation*
Hair Salon Dispute: Mediator

Position: Party A – What do I think they are seeking?
What is Party A's position? *Please identify who is Party A.*

1. _____

Position: Party B – What do I think they are seeking?
What is Party B's position? *Please identify who is Party B.*

1. _____

Interests: Party A – Why are they seeking what they are seeking? What I think they really care about (i.e., their wants, concerns, hopes and fears).
What are Party A's interests?

1. _____
2. _____
3. _____
4. _____

Interests: Party B – Why are they seeking what they are seeking? What I think they really care about (i.e., their wants, concerns, hopes and fears).
What are Party B's interests?

1. _____
2. _____
3. _____
4. _____

Speaking Sequence
Who will you ask to speak first? Why?

1. _____

Appropriateness of Mediation
Why do you think mediation will be an appropriate way to deal with this dispute?

1. _____

Obstacle to Settlement
What do you anticipate will be the greatest obstacle to achieving a win–win settlement?

1. _____

*Adapted from R. Fisher & D. Ertel, *Getting Ready to Negotiate: The Getting to Yes Workbook* (New York: Penguin, 1995).

Appendix B Role Play: Multi-Party Roommate Mediation

Type: Mediation Role Play

Participants One or two mediators, four parties, no representatives

Level of Difficulty Advanced

Time Set aside approximately 60 minutes for this activity, including 10–15 minutes to read the roles, 20–25 minutes for the mediation, and 15–20 minutes for the debrief

Objectives

- Introduce students to the process for mediation
- Allow students to practise working with a mediator
- Provide an opportunity to deal with a multi-party dispute through mediation

Preparation

- Divide the students into groups of five or six (if there are six students in a group, two students should co-mediate)
- Assign a role to each student
- Ask students to read their roles
- The parties should complete the ADR Worksheet for Mediation (Party)
- The mediator should complete the ADR Worksheet for Mediation (Mediator)

Debriefing with Students

1. Mediators, what was it like to be a mediator for this dispute?
2. Mediators, did you find it difficult to maintain control of all of the parties during the mediation?
3. Parties, what was it like to work with a mediator?
4. What was the resolution?
5. Was this matter appropriate for mediation?
6. How successful do you think this matter would have been if the roommates tried to negotiate on their own without the assistance of a mediator?
7. What did you learn from this mediation that will help you in your future practice as a paralegal?

Multi-Party Roommate Dispute

Role for the Mediator

You are a volunteer mediator with a college mediation service on campus. You have had a lot of experience mediating disputes between students and between roommates.

In the present matter, you were contacted by a second-year college student, Illia, who is having some difficulties with his roommates. He explained that there are four students sharing a house, but they only have room for two vehicles in the driveway. Two of the roommates, Ramtin and Amir, have their own vehicles. Over the past several months, they have had some difficulty coordinating parking because they have to park with one vehicle in front of the other, which means regularly rearranging the vehicles. But they have been able to work it out so far.

The matter has become more complicated because one of the other roommates, Tyrone, has a new girlfriend who lives two hours away and likes to drive to visit him on the weekends.

All of the roommates pay the same rent of $500 per month. And the lease made it clear that there were only two parking spots available.

The roommates have agreed to work with the campus mediation service to sort out their parking dilemma.

Role for Roommate: Ramtin

You are in your final year of college. For the past several months you have been living with three other students: Illia, Amir, and Tyrone. The four of you get along very well, but do have issues with the parking arrangement. You specifically chose to live in this house because there were two parking spots available in the driveway and you have your own car.

Amir is the only other roommate who has his own car. There has been some difficulty with you and Amir coordinating parking because you have to park with one vehicle in front of the other, which means regularly rearranging the vehicles. But you have been able to work it out so far. This can be a challenge for you because you specifically chose all afternoon classes so that you can sleep in every day. You work at a local pub and often get home after the other roommates are already asleep. This means that you park behind Amir when you get home, but have to move your car in the morning.

The matter has become more complicated because one of your other roommates, Tyrone, has a new girlfriend who lives two hours away and likes to drive to visit him on the weekends. Tyrone wants his girlfriend to be able to park in the driveway.

Appendix B Continued

All of the roommates pay the same rent of $500 per month. And the lease made it clear that there were only two parking spots available.

Your roommates have all agreed to work with the campus mediation service to sort out this parking dilemma.

Role for Roommate: Amir

You are in your final year of college. For the past several months you have been living with three other students: Illia, Ramtin, and Tyrone. The four of you get along very well, but do have issues with the parking arrangement. You specifically chose to live in this house because there were two parking spots available in the driveway and you have your own car.

Ramtin is the only other roommate who has his own car. There has been some difficulty with you and Ramtin coordinating parking because you have to park with one vehicle in front of the other, which means regularly rearranging the vehicles. But you have been able to work it out so far. This can be a challenge for you and your roommate, Illia, because you like to get up early and go to the gym before your morning classes. The other roommates are still sleeping at this time, but your car is often blocked in by Ramtin because he gets home late. He grumbles and complains a bit when you have to wake him up.

The matter has become more complicated because one of your other roommates, Tyrone, has a new girlfriend who lives two hours away and likes to drive to visit him on the weekends. Tyrone wants his girlfriend to be able to park in the driveway.

All of the roommates pay the same rent of $500 per month. And the lease made it clear that there were only two parking spots available.

Your roommates have all agreed to work with the campus mediation service to sort out this parking dilemma.

Role for Roommate: Illia

You are in your final year of college. For the past several months you have been living with three other students: Amir, Ramtin, and Tyrone. The four of you get along very well, but the other roommates seem to have issues with the parking arrangement. Since you do not even have a driver's license, you have no need for the parking spot.

Ramtin and Amir both have their own cars. There has been some difficulty with them trying to coordinate parking because they have to park with one vehicle in front of the other, which means regularly rearranging the vehicles. But they have been able to work it out so far.

The matter has become more complicated because one of your other roommates, Tyrone, has a new girlfriend who lives two hours away and likes to drive to visit him on the weekends. Tyrone wants his girlfriend to be able to park in the driveway.

All of the roommates pay the same rent of $500 per month. And the lease made it clear that there were only two parking spots available. Lately, you have started thinking that perhaps you should be paying less rent because you do not have access to a parking spot.

You are most supportive of Amir because he always offers to drive you to the gym and to campus, but you try not to take sides. Since you want everyone to get along, you decided to contact the campus mediation service. Your roommates have all agreed to attend mediation to sort out this parking dilemma.

Role for Roommate: Tyrone

You are in your final year of college. For the past several months you have been living with three other students: Amir, Ramtin, and Illia. The four of you get along very well, but do have issues with the parking arrangement.

Ramtin and Amir both have their own cars. There has been some difficulty with them trying to coordinate parking because they have to park with one vehicle in front of the other, which means regularly rearranging the vehicles. But they have been able to work it out so far.

The matter has become more complicated because your new girlfriend, who lives two hours away, likes to drive to visit you on the weekends. You think it is only fair for her to park in the driveway since Amir and Ramtin are able to use the driveway all week.

All of the roommates pay the same rent of $500 per month. And the lease made it clear that there were only two parking spots available. Lately, you have started thinking that perhaps you should be paying less rent because you do not have access to a parking spot.

Your roommates have all agreed to work with the campus mediation service to sort out this parking dilemma.

ADR Worksheet for Mediation*
Multi-Party Roommate Dispute: Party

My Position – What am I seeking?

1 _____

My Interests – Why am I seeking what I am seeking? What I really care about (i.e., my wants, needs, concerns, hopes and fears)

1 _____
2 _____
3 _____
4 _____

Opposing Parties' Positions – Based on the information provided, what do I think they are seeking? What are their positions? *Please identify who is Party A, B and C*

Party A _____
Party B _____
Party C _____

Opposing Parties' Interests – Why are they seeking what they are seeking? What I think they really care about (i.e., their wants, concerns, hopes and fears)

Party A
1. _____
2. _____

Party B
1. _____
2. _____

Party C
1. _____
2. _____

Options – Possible agreements that we might reach

1. _____
2. _____
3. _____
4. _____
5. _____

Objective Criteria/Legitimacy/Proof – External standards or precedents that will help the parties to assess any options (e.g., market value, precedents, scientific judgment, professional standards, costs, what a court might decide, moral standards, expert opinions, equal treatment, or tradition). *Be specific to the scenario.*

1. _____
2. _____

BATNA (Walk Away Alternative) – What can I do if I walk away without agreement? What is my back up plan? What is my next step?

1. _____
2. _____
3. _____

*Adapted from R. Fisher & D. Ertel, *Getting Ready to Negotiate: The Getting to Yes Workbook* (New York: Penguin, 1995).

ADR Worksheet for Mediation*
Multi-Party Roommate Dispute: Mediator

Parties' Positions – Based on the information provided, what do I think they are seeking? What are their positions? *Please identify who is Party A, B, C and D.*

Party A: _____
Party B: _____
Party C: _____
Party D: _____

Opposing Parties' Interests – Why are they seeking what they are seeking? What I think they really care about (i.e., their wants, concerns, hopes and fears).

Party A:
1. _____
2. _____

Party B:
1. _____
2. _____

Party C:
1. _____
2. _____

Party D:
1. _____
2. _____

Speaking Sequence

Who will you ask to speak first? Why?

1. _____

Appropriateness of Mediation

Why do you think mediation will be an appropriate way to deal with this dispute?

1. _____

Obstacle to Settlement

What do you anticipate will be the greatest obstacle to achieving a win–win settlement?

1. _____

*Adapted from R. Fisher & D. Ertel, *Getting Ready to Negotiate: The Getting to Yes Workbook* (New York: Penguin, 1995).

Mediation Advocacy

8

Learning Outcomes

After reading this chapter, you will be able to:

- Identify issues appropriate for mediation.
- Plan for the appropriate timing and location of a mediation.
- Recognize traits to look for when selecting a mediator.
- Understand how to prepare a client for mediation.
- Appreciate the need for ground rules and an agreement to mediate.
- Identify the roles and responsibilities of the parties, legal representatives, and mediator in a mediation session.
- Recognize strategies that can be used during mediation.
- Appreciate the importance of client participation and option generation during mediation.
- Appreciate how to be an effective advocate in mediation.
- Apply the concepts from this chapter to a recurring conflict case scenario.

Introduction

As discussed in Chapter 7, mediation is a form of alternative dispute resolution (ADR) that uses collaborative discussions between disputants in an effort to reach a resolution to their dispute. These discussions can take place with or without the presence of legal representatives. Mediation is often used as a part of settlement discussions for a wide range of legal matters. Preparing to be an effective advocate in mediation is different than preparing for court. As stated by Macfarlane, "Mediation advocacy requires a new application of old skills."[1] However, it can be difficult to know how to apply these skills to properly represent a client in mediation.

Since mediation is successful in achieving effective resolutions and high levels of client satisfaction, it is important for legal professionals to understand this ADR process and learn how to properly support clients in order to advocate for their best interests in mediation.

Prior to the Mediation Session

A legal representative's efforts to be a strong advocate in mediation start prior to the actual mediation session. There are many different steps to effectively prepare clients and documents in advance of the scheduled mediation.

Timing of Mediation

Determining the appropriate timing for mediation is a bit of a balancing act: mediation should take place as soon as possible, but it cannot be conducted too early in the process because it is important to first obtain all of the information that will be needed to effectively engage in settlement discussions. For example, under Rule 24.1 of the *Rules of Civil Procedure*, certain civil actions in Toronto, Windsor, and Ottawa are subject to mandatory mediation. The rules provide that a mediation must take place within 180 days after the first defence is filed.[2] That is much faster than a matter would be scheduled for trial. The rules do recognize that it is not always possible to conduct mediation within the specified time frame and thus allow for the parties to agree to an extension of time or for the court to order an extension.[3]

Beyond the matters that are required to attend mandatory mediation, other legal matters may have prescribed requirements for attempts at settlement. In accordance with Rule 13.01 of the *Rules of the Small Claims Court*, settlement conferences are required for every defended action and must be held within 90 days after the filing of the first defence.[4]

In the absence of any specific legislative requirements, the general rule of thumb is that mediation should be conducted as soon as it is reasonable to do so, with consideration to the type of matter, mediator and party preference, and availability of relevant evidence.

1 J Macfarlane, *The New Lawyer* (Vancouver: University of British Columbia Press, 2008) at 20.

2 *Rules of Civil Procedure*, RRO 1990, Reg 194, r 24.1.09.

3 *Ibid.*

4 *Rules of the Small Claims Court*, O Reg 258/98, r 13.01.

The possibility of achieving an early resolution to a dispute can be appealing to parties who are focused on the possibility of saving time and money. It can take months, or years, for a matter to proceed to trial. By contrast, the flexible nature of mediation allows for it to be scheduled early enough that clients will not incur the additional costs associated with trial preparation, further research, and attendance at trial. This could amount to time savings of several months and the potential to save hundreds, or thousands, of dollars.

A mediation should be scheduled early—recognizing that parties in conflict may develop a "litigation mindset" as the trial date draws closer. Focused on winning in court, parties can become further entrenched in their positions and entitlements. This self-righteous attitude may prevent a party from being open to alternative settlement options at mediation. Litigation often brings out the competitive, aggressive nature in people. As a result, the closer it is to the court date, the less incentive there is to mediate.

While there is an argument in favour of early mediation, legal representatives must recognize that the mediated efforts could be wasted if the session is scheduled too early in the proceedings. It is not appropriate to attend mediation if all of the required evidence has not yet been obtained (e.g., it may take several months to obtain medical records or expert opinions).

Selecting a Mediator

In some cases, the mediator can be selected in advance (e.g., through the Ontario Mandatory Mediation Program or in a private mediation); in other cases, the mediator will automatically be assigned (e.g., before a government agency, such as the Landlord and Tenant Board). If the parties have an opportunity to select a mediator, the representative and the client should have a discussion in order to choose the mediator who best fits the needs of everyone involved. Since the mediator community is relatively small, and top mediators are usually booked months in advance, there may be a need to consider several potential mediators.

As discussed in Chapter 7, it is important to understand the mediator's style. Consider whether to select a mediator who takes on a facilitative role or an evaluative role. It is essential to make this determination in advance because it will guide the legal representative in explaining the process to the client and prepare them for mediation. For instance, when dealing with a mediator who adopts an evaluative framework, it is important to discuss all the strengths and weaknesses of the matter with the client and provide them with a thorough assessment of the case—perhaps to an even greater extent than would be needed for a facilitative mediation. Because an evaluative mediator will express an opinion on the merits of the case, it is essential that a client first hear about any pitfalls or risks from their legal representative instead of first learning this information from the mediator. This should include a discussion about all relevant case law (both in the client's favour and against) that may be applicable to the facts of the case.

When both sides are represented, it is typically the legal representatives who select the mediator since the representatives tend to be more experienced and knowledgeable about what to look for in a mediator. However, a challenge can arise with both sides coming to an agreement on who should be the mediator. In order to address

this roadblock, there is often an opportunity for a mediator to be assigned, instead of selected.

Representatives who want to establish a good rapport with the other side may be tempted to allow the other representative to select the mediator. While this is a courteous gesture, it can be problematic if the selected mediator is biased or does not have a mediation style appropriate for the dispute. The best course of action is to collaborate with opposing parties and representatives in order to select a mediator who will meet the needs of everyone involved in the dispute.

Because mediators are not regulated, and there are no formal requirements in Ontario to become a mediator, the onus is on the legal representatives to ensure that appropriate research has been conducted and that inquiries have been made relating to a mediator's background and qualifications. In Ontario, for example, the Ministry of the Attorney General suggests that legal representatives should contact potential mediators directly to learn about their training, experience, knowledge, approach, and fees.[5] It is also appropriate to ask a potential mediator for references or testimonials.

Once selected, mediators will usually be agreeable to a phone call, conference call, or video conference call (e.g., Zoom) prior to the mediation session in order to further clarify the process and procedures.

PRACTICE TIP

Keeping Notes on Your Mediation Experience

After every mediation, legal representatives are encouraged to take the time to write a few notes about the process and about their experience with that particular mediator. Consider the following questions:

- What was the mediator's style?
- Did the mediator encourage active client participation?
- Was most of the mediation conducted in joint session or in private caucus?
- Are there any scheduling restrictions with this mediator (e.g., only certain days of the week)?
- Was the mediator able to maintain control over the mediation process?
- Is this mediator willing to conduct a virtual mediation, if the need arises?
- What were the mediator's fees and terms for payment?

For future matters, these notes should be consulted before selecting a mediator. When working with an unfamiliar or new mediator, it is advisable to check with colleagues to obtain as much insight and information about the mediator as possible.

5 Ministry of the Attorney General of Ontario, "Mandatory Mediation for Civil Cases," online: <https://www.ontario.ca/page/mandatory-mediation-civil-cases#section-0>.

Location of Mediation

Not all mediators work out of an office where they can conduct the mediation sessions; some mediators have a home-based business or an office-sharing arrangement. In these cases, legal professionals may be asked for suggestions as to where the mediation session should take place.

A mediation could be held at the office of one of the legal representatives, but there are some things to consider if it is going to take place at your office. The benefits of scheduling the mediation at your own office include familiarity with the environment (which could make the client more comfortable) and access to necessary resources (e.g., files, documents, research materials, photocopier, support staff). However, it can be difficult to terminate a mediation session held at your office: a legal representative cannot physically leave their own office, and it can be awkward to ask another party to leave. Also consider the impact that this could have on the opposing side: they may find it uncomfortable to speak about an issue when they are not on neutral territory and may also feel more vulnerable if they feel that the location is advantageous to the other party. As a result, the location may have an impact on the willingness of parties to openly discuss a matter.

Another option is that the mediation session could be held in a rented boardroom or meeting room. There is an additional cost involved with this option, which will typically be included in the mediator's invoice and ultimately paid by the parties to the dispute. Most larger cities have companies that are in the business of providing office space that can be rented for settlement meetings or mediations. Some hotels will also rent meeting space that may be appropriate for mediation.

Regardless of where the mediation session takes place, ensure that the client has been provided with full address details and directions. It can be difficult to find some mediation locations because mediation does not take place in a set location (i.e., not at the courthouse) and there is unlikely to be a large mediation business sign posted out front of the building. As an additional concern, some venues can be challenging to access by public transit.

Who Should Attend Mediation

Progress toward settlement cannot be achieved unless the appropriate parties are present at mediation to participate in the discussions. The appropriate parties include anyone named in the action and their representatives. These parties should confirm their authority to settle the matter and their ability to bind the corporation (if dealing with a corporate party). It can be very frustrating to spend several hours trying to negotiate a settlement only to discover that the other party does not have the authority to settle.

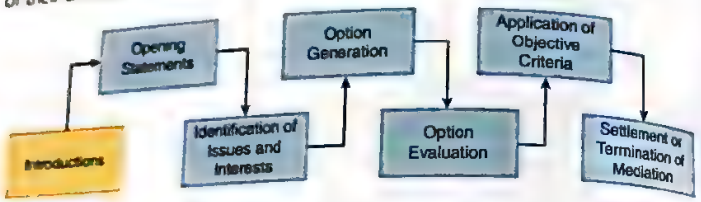
Some clients may have opted to hire a legal representative in an effort to eliminate the need to personally attend and actively participate in dealing with their legal matter. However, in most cases, parties do need to be present and participate in the mediated discussions, regardless of whether they have a legal representative. Client attendance at mediation is an important part of the mediation process because their presence provides an opportunity for the parties to confront each other, seek clarification, and work through various issues. It is always better to have a first-hand account of the situation than to have the information conveyed through a third-party legal representative.

Most mediators will require the parties to be present, while other mediators may allow an exception and permit representatives to speak on behalf of their client as long as the client is available to be contacted.

Mediators will sometimes allow parties to bring a friend or support person to the mediation in an effort to help each party to feel more comfortable and to provide personal insight or support. It is advisable to inquire as to who, if anyone, will be coming to act as support for the other side. While it would be difficult to oppose the presence of a support person, it may be useful if the client has advance warning. For example, it could be intimidating for a client if they decline to bring a support person and the other side brings four family members or if the other side brings a mutual friend of both parties.

Explaining the Stages of Mediation to Your Client

Most clients will not be overly familiar with the mediation process and will require assistance to feel prepared. This includes providing an explanation of the process and stages. Although individual mediators can opt to conduct the mediation in the format of their choice, a common format for mediation includes the following stages:



Introductions: The mediator will begin the session with introductions of everyone present at the mediation session. This typically involves an introduction of the mediator with an overview of the mediator's training and experience. In an effort to reinforce the informal and personalized nature of mediation, the introduction stage will usually include a suggestion to proceed with the parties addressing each other on a first-name basis.

Opening statements: Each party (or representative) will have an opportunity to give a first-hand account of the series of events that brought the matter to mediation. During the delivery of opening statements, the opposing party is expected to listen without interruption.

Identification and clarification of issues and interests: Based on what was presented in the opening statements, the mediator will identify the issues that need to be discussed in more detail in order to fully appreciate each party's underlying interests. The mediator will likely seek clarification on a number of items and ask for additional input from the parties and representatives.

Option generation: Once all participants have a solid understanding of each side's perspective on the issues, the mediator will lead the parties through a process of generating options. In most instances, the mediator will not personally suggest options, but instead will facilitate the discussion and keep a list of options that have been suggested by the participants. This stage does not end with the first option that seems to be reasonable. Rather, the mediator will encourage the parties to brainstorm and develop a wide variety of options. The option generation stage can be conducted in joint session or in private caucus, or in joint session supplemented with private caucusing.

Option evaluation: Once a number of possible options have been generated, the mediator will ask the participants to evaluate the options. This process usually starts by trying to identify if there are any options that are clearly not appropriate. Next, to indicate whether there are any promising options that may need further exploration or discussion. And finally, if any of the options can be combined together to create an optimal or ideal resolution.

Application of objective criteria: The next step is to apply objective criteria to determine which options are fair and reasonable for the circumstances of the case. Essentially, the parties are to look at any criteria, external to the mediation, that can be used to help assess the fairness and appropriateness of each of the remaining options. This may lead to eliminating options, combining options, further developing existing options, or even creating new options.

Achieving settlement or terminating mediation: Once the participants have had an opportunity to consider all possible options, they may decide to pursue one of the proposed options, or a combination of the proposed options. At this point, the mediator will lead the parties through the process of drafting a settlement agreement, which will become a binding agreement once it is signed by the parties. Alternatively, if settlement has not been achieved, the parties may opt to schedule an additional mediation session or terminate the session and pursue other options, such as arbitration or proceeding to litigation.

Preparing Your Client for Mediation

Going to mediation is different than going to trial and will take special preparation of clients. Since the parties will take an active role in the discussions and in deciding if, and how, the matter should be resolved, they need to have a full understanding of what to expect and how to maximize the likelihood of a resolution.

The following steps should be taken to prepare a client for mediation:[6]

- Describe the mediation process to your client and explain what will happen at the session.
- Ensure you client understands their role and responsibilities during mediation.
- Remind your client that the objective of the mediation is not to "win," but rather to learn more about the case in order to reach a satisfactory resolution.
- Discuss mediation strategies and techniques with your client.
- Ensure that your client has the authority to settle.
- Discuss the costs, risks, and benefits of not reaching a settlement.
- Ensure that your client is knowledgeable about the facts and issues of the case.
- Examine the strengths and weaknesses of each party's case (both factually and legally).
- Explore your client's position, goals, and interests.
- Speculate on the position, goals and interests of the other parties.
- Advise your client on how to articulate and explain their interests.
- Determine who will respond to questions that may arise.

6 Adapted from *Ibid.*

- Caution your client about any confidential information that should not be disclosed during joint session.
- Work with your client to prepare an opening statement.

In addition to the aforementioned steps, it would be prudent for representatives to brainstorm with their client about potential challenges and roadblocks to settlement that may arise during the mediation. For instance, if your client has learned that the opposing party has recently become unemployed, it is unlikely that there will be a monetary offer for the full value of the claim. Anticipating the issues before they arise may help representatives to develop workable solutions to address the issues (e.g., preparing a payment plan or suggesting alternative solutions that do not involve money). Whenever possible, try to "expect the unexpected."

In some cases, it may even be beneficial to rehearse the mediation with a client. For example, practising the opening statement will help a client to feel more comfortable when delivering it at the mediation. Representatives can provide professional insight and advice about the opening statement (e.g., what should be included and how to present it). Because parties will face some difficult questions at mediation, it is also useful to discuss the types of questions that may arise during the mediation session. Doing a practice run of some parts of the mediation is time well invested: clients will tend to feel more prepared and more comfortable, while representatives can feel at ease that the client knows what to expect and will respond appropriately.

In addition to preparing procedurally, clients should feel emotionally prepared for the mediation. Although mediation is considered to be a friendlier alternative than going to court, there is a potential for the mediated discussions to become challenging, confrontational, and emotional. Clients should be warned that opposing parties will be expected to sit in close proximity—and they may have to communicate directly—with each other. Depending on the nature of the dispute, this can present a challenge for some clients.

Participants will need to be prepared to deal with another party's emotional outbursts or aggressive accusations. They can expect the mediator to develop and reinforce ground rules in order to keep the discussions as productive as possible. Clients should be reminded to abide by these ground rules and advised that it is in their best interest to remain composed and to refrain from reacting to another participant's poor behaviour.

The extent of a client's participation in the actual mediation session can vary according to mediator preferences, the client's comfort level, and the representative's assessment of the client's ability to make effective, appropriate contributions at mediation. Most mediators will expect some level of direct client interaction and participation—not everything can be described solely through the legal representatives.

Understanding the Client's Case

Legal representatives should have a solid understanding of the matter that will be going to mediation and what the client hopes to achieve. Not every client is focused solely on achieving settlement. Some clients may have a personal agenda for the mediation (e.g., to confront the other party, to get some questions answered, or just to learn more about the other side's perspective). Other clients may be focused entirely on settlement—either to avoid going to court or because of financial or personal need.

A clear understanding of a client's position and underlying interests will help the mediation to run smoothly. For example, because mediation focuses on underlying interests, representatives should discuss these interests with their client. A client's position may be that they are entitled to financial compensation for a poorly constructed renovation, but trying to understand *why the client believes that money will resolve the matter* will help to appreciate the underlying interests that are involved. It could be due to financial need, but might be because they see the payment of a sum of money as a punitive measure against the other party. In such a case, there may be other ways of addressing the client's need to feel as though their opponent should be penalized in some way.

Preparation should also involve speculating on what is important to the other side. Discussing the opponent's position and interests can be useful to understand why they have not been receptive to settling the matter thus far (i.e., try to determine *what is standing in their way* from resolving the dispute) and anticipating what they might realistically offer at mediation.

At mediation, the mediator will ask the participants for input relating to options for settlement. It is helpful to brainstorm several potential options with the client in advance of the mediation session. Preparing a few creative options will help the mediation to progress and will prevent the client from blurting out an inappropriate option during mediation. For example, it might not be ideal for a party to offer to pay the full value of the claim, but once that has been suggested at mediation it can be difficult to move on to any other options. Advance discussion of possible options is helpful, but it is not possible to anticipate all potential options until the relevant information is exchanged between the participants. Therefore, remind clients to remain open to adjusting the prepared options as more knowledge and information is gained throughout mediation. When planning potential options, consider the BATNA and WATNA for both sides how these alternatives will impact the response to any offers that may be presented (see Chapter 6, Preparing to Negotiate on a Client's Behalf).

PRACTICE TIP

Use of Objective Criteria

You should try to anticipate options that will be discussed and how these options can be evaluated using various forms of objective criteria. For example, if the dispute involves the cost of a particular item or service, it would be prudent to consider obtaining quotes or written expert opinions that could be presented at mediation. This will alleviate the need to suspend the mediation in order to obtain objective criteria.

In summary, representatives should work with their clients to fully understand the client's:

- position,
- interests,
- options,
- objective criteria, and
- BATNA and WATNA.

Additionally, it is useful to speculate on the other side's position, interests, BATNA, and WATNA.

Mediation Documentation

ADR brief
a written document that is provided to the mediator in order to outline the factual and legal issues in dispute, also known as a "statement of issues," "mediation brief," or "mediation memorandum"

statement of issues
documentation required to be submitted to the mediator prior to the mediation session that sets out the issues that need to be discussed at mediation; also known as an "ADR brief," "mediation brief," or "mediation memorandum"

Legal professionals are regularly required to prepare written documentation prior to a scheduled mediation. The more formal the process, the more likely representatives will be asked to provide a written **ADR brief** (also known as a "mediation brief," "mediation memorandum," or "statement of issues"). An ADR brief contains the information that a mediator will need in advance of the scheduled session. For example, the Ontario Mandatory Mediation Program requires parties to submit a **statement of issues** at least seven days prior to the scheduled mediation. The statement of issues will contain background information about the factual and legal issues in dispute, as well as each party's position and interests. The statement of issues is also shared with the opposing party. If a legal action has already been commenced, most mediators will require a copy of the pleadings.

A copy of Form 24.1C under the *Courts of Justice Act*[7] (the statement of issues for the Ontario Mandatory Mediation Program) is reproduced in Figure 8.1.

Case law and evidence (e.g., photographs, contracts) can be included as supporting documentation to the ADR brief. While many mediations are resolved without citing case law and legal precedents, it is important to have an appreciation of the binding authorities in order to make informed recommendations to your client. Any documentation prepared for mediation should be reviewed and discussed with the client prior to the mediation session.

PRACTICE TIP

Preparing an ADR Brief

Tips for drafting an effective mediation brief:

- Include relevant facts.
- Provide a brief review of the law.
- Include expert reports, if relevant.
- State the issues briefly; consider formatting them in a numbered list.
- Be persuasive, but not adversarial.
- Focus on documenting your client's interests.
- Attempt to come across as reasonable and willing to collaborate with the opposing party.
- Suggest how the matter should be resolved.
- Include all documents that may be needed to achieve settlement.
- Ensure that you are not simply restating the information contained in your statement of claim or statement of defence.
- Put your best case forward but recognize that it will be read by the mediator, the opposing party, and their legal representative.

Note: these tips would also be applicable when preparing an arbitration brief, if needed.

7 RSO 1990, c C 43

FIGURE 8.1 Form 24.1C: Statement of Issues

FORM 24.1C
Courts of Justice Act
(General heading)

STATEMENT OF ISSUES

(To be provided to mediator and parties at least seven days before the mediation session)

1. Factual and legal issues in dispute

The plaintiff (or defendant) states that the following factual and legal issues are in dispute and remain to be resolved.

(Issues should be stated briefly and numbered consecutively.)

2. Party's position and interests (what the party hopes to achieve)

(Brief summary.)

3. Attached documents

Attached to this form are the following documents that the plaintiff (or defendant) considers of central importance in the action: *(list)*

(date)

(party's signature)

(Name, address, telephone number and e-mail address (if any) of lawyer of party filing statement of issues, or of party)

NOTE: When the plaintiff provides a copy of this form to the mediator, a copy of the pleadings shall also be included.

NOTE: Rule 24.1.14 provides as follows:

All communications at a mediation session and the mediator's notes and records shall be deemed to be without prejudice settlement discussions.

RCP-E 24.1C (February 1, 2021)

Any correspondence sent out by the mediator prior to the mediation session should also be carefully reviewed. Such correspondence is most often sent to the legal representatives instead of to the parties and may include important details about scheduling and location, as well as further details about how the mediation will be conducted. Review the correspondence to determine if it includes an invoice from the mediator. Mediators vary in their payment policies: some mediators may require payment in advance of the mediation, while other mediators may invoice after the session is complete. Ensure that the mediator is paid promptly—delayed payment reflects poorly upon a legal representative's professionalism.

During the Mediation

Role of the Participants

The mediator will discuss the roles of the participants and expectations for their conduct during the mediation. In some situations, this information is documented in an **agreement to mediate**; in other situations, it is delivered verbally by the mediator.

agreement to mediate
a contract prepared by the mediator that sets out the general expectations for the mediation session, also known as "terms of mediation"

Mediators: The role of the mediator is to remain neutral while facilitating the discussion. The mediator will not deliver a verdict at the end of the session. The mediator will encourage parties to determine their own settlement on their own terms. While this is empowering for the parties to resolve their own matter, it also means that a mediation comes with no guarantee of a resolution.

The mediator must refrain from providing legal advice or representation during the mediation. A mediator who is also a licensee of the Law Society of Ontario (e.g., a paralegal or lawyer) is required to clarify the role of the mediator and is specifically prohibited from providing legal advice to the parties during the mediation.[8]

Parties: Each party's role during the mediation is to actively participate in the settlement discussions and to address any outstanding issues or differences with the opposing party in hopes of achieving resolution. In most cases, the parties will participate when they are asked to participate, either by their representative or by the mediator.

In addition to following the ground rules set out by the mediator, clients should be advised of expected norms of behaviour to help ensure that the mediation session runs

8 Rule 2.01(6), Law Society of Ontario, *Paralegal Rules of Conduct* (1 October 2014; amendments current to 24 February 2022), online: <https://lso.ca/about-lso/legislation-rules/paralegal-rules-of-conduct>. For the most up-to-date material, please visit the website referenced in this footnote.

smoothly. Specifically, parties to the mediation should never argue or debate. Instead, they are expected to listen carefully without interrupting the other side. If a client would like to respond to a point that has been made by the opposing side, their representative should instruct the client to make a note of what has been said and what they would like to say in response, and then assure their client that they will have a turn to speak.

Legal representatives: Legal representatives should engage in open, honest communication with a focus on joint problem-solving. While the mediator will likely require some component of client participation, representatives should be prepared to answer any questions that may arise and to engage in the process of generating options. Representatives must know how to support and protect a client by providing legal information and strategic advice during the session. Once options have been generated, there will be an opportunity to assess the merits of the case in order to advise the client on whether any of the options should be pursued further. If settlement is achieved, the representatives will play a role in drafting and reviewing the terms of the agreement.

Supporters: Supporters (e.g., friends or family members) who attend the mediation should provide moral and emotional support to the parties. Supporters do not need to contribute to the discussion; instead, they may find that they are able to provide the most assistance during private caucus when the person they are supporting seeks another opinion or personal reassurance.

PRACTICE TIP

A Task for Your Client During Mediation

While clients should actively participate in mediation, it can be difficult for them to maintain their composure as the discussions continue and emotions escalate. A single, slight, disapproving facial expression can derail the mediation and reverse any progress that has been made. Therefore, it can be useful to assign a task to your client. For example, asking a client to take detailed notes of everything that is discussed can have the benefit of forcing the client to focus on everything that is said, instead of interrupting, responding, and reacting. As an additional benefit, the client will generate a written record of the mediation, allowing representatives to focus on the discussions and not documenting the details. This written record will prove to be useful if the matter remains unresolved and requires further preparation for trial.

Agreement to Mediate

Mediation sessions usually begin with the introduction of a contract known as an agreement to mediate (also known as "terms of mediation"). The mediator prepares this document in advance of the mediation. The agreement to mediate sets out the general expectations for the mediation session. An overview and discussion of this document will be provided by the mediator at the onset of the mediation. Parties will be asked to indicate their agreement with the terms of the agreement by signing a copy.

There is no standard agreement to mediate template used by all mediators, and there can be significant variance in the content of the document from one mediator to another. However, key topics that are commonly addressed in these agreements include: confidentiality, impartiality, relationship to legal proceedings, and authority to settle. The "Sample Agreement to Mediate" in Figure 8.2 presents an example of an agreement to mediate.

FIGURE 8.2 Sample Agreement to Mediate

This is an agreement between _____ and _____, hereinafter "participants," and _____, hereinafter "mediator," to enter into mediation with the intent of resolving issues related to _____

The participants and the mediator understand and agree as follows:

1. Nature of Mediation

The participants hereby appoint _____ as mediator for their negotiations. The participants understand that mediation is an agreement-reaching process in which the mediator assists participants to reach agreement in a collaborative, consensual and informed manner. It is understood that the mediator has no power to decide disputed issues for the participants. The participants understand that mediation is not a substitute for independent legal advice. The participants are encouraged to secure such advice throughout the mediation process and are strongly advised to obtain independent legal review of any mediated agreement before signing that agreement. The participants understand that the mediator's objective is to facilitate the participants themselves reaching their most constructive and fairest agreement. The participants also understand that the mediator has an obligation to work on behalf of each party equally and that the mediator cannot render individual legal advice to any party and will not render therapy within the mediation.

2. Scope of Mediation

The participants understand that it is for the participants, with the mediator's concurrence, to determine the scope of the mediation and this will be accomplished early in the mediation process.

3. Mediation is Voluntary

All participants here state their good faith intention to complete their mediation by an agreement. It is, however, understood that any party may withdraw from or suspend the mediation at any time, for any reason.

The participants also understand that the mediator may suspend or terminate the mediation if they feel that the mediation will lead to an unjust or unreasonable result, if the mediator feels that an impasse has been reached, or if the mediator determines that they can no longer effectively perform their facilitative role.

4. Confidentiality

It is understood between the participants and the mediator that the mediation will be strictly confidential. As such, all mediation discussions, including all written, oral and digital communications with both participants and their advisors, any draft resolutions, and any unsigned mediated agreements shall not be admissible in any court proceeding. Only a mediated agreement, signed by the participants, may be so admissible. The participants further agree to not call the mediator to testify concerning the mediation or to provide any materials from the mediation in any court proceeding between the participants. The mediation is considered by the participants and the mediator as settlement negotiations. The participants understand the mediator has an ethical responsibility to break confidentiality if they suspect a party or another person may be in danger of physical harm.

5. Full Disclosure

Each party agrees to fully and honestly disclose all relevant information and writings as requested by the mediator and all information requested by any other party of the mediation if the mediator determines that the disclosure is relevant to the mediation discussions.

6. Mediator Impartiality

The participants understand that the mediator must remain impartial throughout and after the mediation process. Thus, the mediator shall not champion the interests of any party over another in the mediation or in any court or other proceeding. The participants agree that the mediator may discuss the participants' mediation process with any attorney any party may retain as individual counsel. Such discussions will not include any negotiations, as all mediation negotiations must involve all participants directly. The mediator will provide copies of correspondence, draft agreements, and written documentation to independent legal counsel at a party's request. The mediator may communicate separately with an individual mediating party, in which case such "caucus" shall be confidential between the mediator and the individual mediating party unless they agree otherwise.

7. Litigation

The participants agree to refrain from pre-emptive maneuvers and adversarial legal proceedings (except in the case of an emergency necessitating such action), while actively engaged in the mediation process.

8. Mediation Fees

The participants and the mediator agree that the fee for the mediator shall be $_____ per hour for time spent with the participants and for time required to study documents, research issues, correspond, telephone call, prepare draft and final agreements, and do such other things as may be reasonably necessary to facilitate the participants' reaching full agreement. The participants further understand that copying, postage and long-distance phone calls will be billed to them. The mediator shall be reimbursed for all expenses incurred as a part of the mediation process. A deposit payment of _____ toward the mediator's fees and expenses shall be paid to the mediator along with the signing of this agreement. Any unearned amount of this deposit fee will be refunded to the participants.

The participants shall be jointly and severally liable for the mediator's fees and expenses. As between the participants only, responsibility for mediation fees and expenses shall be _____

The participants will be provided with a monthly accounting of fees and expenses by the mediator. Payment of such fees and expenses is due to the mediator no later than 15 days following the date of such billing, unless otherwise agreed in writing.

Should payment not be timely made, the mediator may, at their sole discretion, stop all work on behalf of the participants, including the drafting and/or distribution of the participants' agreement, and withdraw from the mediation.

Dated this _____ day of _____, 20____

Signatures

Source: Adapted from James Melamed, "Sample Agreement to Mediate" (5 September 2018), online: *Mediate.com* <http://www.mediate.com/articles/melamed6.cfm>.

Ground Rules in Mediation

Stressful conflicts that have escalated into legal disputes tend to bring out poor behaviour amongst the parties. A party who is otherwise calm and rational may be provoked to act out or retaliate during mediation. However, this type of inappropriate behaviour will not be tolerated by the mediator. The mediator will make every effort to ensure that discussions are respectful and collaborative. It is standard for mediators to develop behavioural guidelines that are set out as ground rules to be enforced throughout the mediation session. Although the rules are typically established by the mediator, there may be an opportunity for the parties and their representatives to suggest additional customized rules that may be applicable to their dispute. The box below provides a sample of behavioural expectations during mediation.

COMMON GROUND RULES IN MEDIATION

1. We agree to take turns speaking and to try to not interrupt each other.
2. We agree to call each other by our first names, not "he" or "she" or worse.
3. We will ask questions of each other for the purposes of gaining clarity and understanding and not as attacks.
4. We agree to try to avoid establishing hard positions and express ourselves in terms of our needs and desires and the outcomes that we wish to create.
5. We agree to listen respectfully and sincerely try to understand the other's needs and interests.
6. We recognize that, even if we do not agree with it, each of us is entitled to our own perspective.
7. We will seek to avoid dwelling on things that did not work in the past, and instead focus on the future we want to create.
8. We agree to make a conscious, sincere effort to refrain from unproductive arguing, venting, and narration and agree to use our time in mediation to work toward what we perceive to be our most constructive agreement possible.
9. We will speak up if something is not working for us in the mediation.
10. We will request a break if helpful.
11. While in mediation, we will refrain from furthering adversarial legal proceedings, except in the case of an emergency necessitating such action
12. We will point out if we feel the mediator is not impartial as to person and neutral as to result.

J Melamed, "Sample Mediation Ground Rules" (7 August 2018), online: Mediate.com <http://www.mediate.com/articles/melamed7.cfm>.

A party who is in violation of one of the ground rules that were set out at the onset of the mediation will be reminded to abide by the rules. Repeated violation of the ground rules may lead to a need for the mediator to recommend a private caucus or, in extreme situations, the termination of the mediation session.

Opening Statements

Similar to a trial, each side will have an opportunity to provide an **opening statement** at mediation. Representatives should work with clients to prepare the opening statement in advance. It should be designed to not only highlight the merits of the case but also demonstrate a willingness to work toward resolution. A good advocate will know how to balance the impression of being "trial ready" while also being committed to settlement. This knowledge comes with practice and experience. Keep the audience in mind when preparing the opening statement—the primary audience is the opposing party. Prepare the opening statement using everyday language instead of legal jargon because it can be difficult to persuade someone who does not understand the terminology being used.

opening statement a statement delivered at the beginning of a mediation session to set out the position and interests for each party

The content of the opening statement should be designed to capture the attention of the other side without coming across as aggressive or threatening. It should communicate a client's position as well as their underlying interests, but in most cases the opening statement will not include specific references to case law. While it can be delivered by either the representative or their client, this decision should be made on a case-by-case basis. The opening statement can be more persuasive when delivered by the client because it comes across as more genuine and sincere. But, in some cases, it can be perceived as more aggressive and confrontational when the statement comes directly from the client.

The opening statement can be prepared in advance and practised prior to the mediation, allowing representatives to have some input as to what should be stated and how the message should be delivered. A nervous client may feel more comfortable if they are able to read from a prepared document, but the client should still make every effort to make eye contact and express sincerity while delivering the opening statement. Allowing the client to deliver the opening statement satisfies one aspect of active client participation that the mediator may require. And, it fulfills this requirement within a controlled format, which may allow a representative to step in and take a more active role when it is time to deal with any unexpected developments that arise as the mediation progresses (e.g., responding to difficult questions).

Communication During Mediation

Parties involved in a dispute can find it difficult to communicate directly with the person who has "wronged them" in some way. Sometimes merely the sight of this person or their facial expression can interfere with the ability to discuss the matter calmly and rationally. For this reason, it is advisable to recommend that the client look directly at *the mediator* when speaking. This advice is especially helpful at the beginning of a mediation when the parties may be nervous or angry when delivering an opening statement. The mediator will be a receptive audience for the client by actively listening, acknowledging what has been said, and encouraging the client to continue speaking. Looking at the mediator is preferable to speaking directly to the opposing party because there is no guarantee how receptive and supportive the opposition will be to what is being said. However, as the mediation progresses and tensions are potentially reduced, it may be appropriate for the parties to try to speak directly to each other instead of speaking through the mediator.

By contrast, when the representatives are speaking, they should make every effort to speak directly to the opposing party, with some portion of communication directed at the opposing legal representative. There is really no need for representatives to communicate through the mediator because they are not personally invested in the dispute and do not usually need to filter the conversation in such a manner. Furthermore, communicating directly with the opposing party is recommended because that is the individual who needs to understand the content and who will ultimately need to be persuaded to agree with what is being presented.

Prior to the mediation, representatives should develop a plan establishing who will be responsible for responding to questions that arise during the mediation. Because this involves real-time analysis and response, there are times when it may be preferable for the representative to jump in to respond to a question in an effort to protect their client. It is acceptable for a representative to interject by simply stating, "I will respond to that question on behalf of my client."

A good advocate in mediation pays attention to what all the participants have said and is also alert to the unspoken dynamics. It is essential to watch and interpret the body language of the opposing party and representative. For example, a knowing glance between the opposing party and their representative can reveal a lot more than what is being revealed by their statements. Representatives should always watch for non-verbal cues, but must remember that the opposing side will be doing the same and it is therefore important to be aware of their own non-verbal tells. Explain to a client the importance of not showing a reaction or immediately responding to options or settlement offers. Chapter 4, Conflict Resolution Skills, has more detail about interpreting and developing an awareness of non-verbal cues.

Mediators will consider a number of different factors in deciding whether the discussions should take place in joint session or in private caucus. **Joint session** refers to a mediation session that occurs with all of the participants together in the same room working through the issues. Whereas a private caucus is a session at which the mediator meets separately with each side in a private meeting space.

joint session
a mediation session in which all of the participants are together in the same room in order to work through the issues

Private Caucus

A private caucus can be a useful tool in furthering the mediation process. A caucus may be suggested by the mediator or requested by a party and their legal representative. Typically, each side will have an opportunity to meet privately with the mediator.

Having a private meeting between the mediator allows each side to explain their perspective to the mediator—without interruption from the other side. Caucusing can also be used to reveal private information that a party may not necessarily feel comfortable revealing in joint session. This allows the mediator to gain valuable information and a deeper appreciation of the issues that may not have been possible when the parties were together. Caucusing can be useful to freely generate and discuss possible options without having these raw ideas being regarded as actual offers.

The mediator may also decide to use caucusing to address power dynamics. A party who is intimidated or not willing to speak up during joint session may feel more comfortable in a private caucus. A caucus can also provide an opportunity for a party to vent. Sometimes having the ability to their express feelings will help a client to get something off their chest and feel more at ease. As a result, they may be better able to continue the discussions with the other side.

Representatives should be cautioned that it is essential to understand a mediator's view on confidentiality during caucusing. Most mediators utilize an approach whereby everything discussed in mediation is confidential and cannot be shared with the other side unless the mediator receives specific instructions to share. This approach to caucusing provides a good opportunity to be upfront with the mediator. However, some mediators opt to do the opposite where the mediator is permitted to reveal all parts of the discussions unless they were specifically asked not to repeat it. This approach to confidentiality reduces the likelihood that a mediator will unintentionally say something that they were not permitted to reveal.

There are situations where a mediator will decide that the entire mediation session be conducted in private caucus and will shuttle back and forth between the parties in order to convey information and offers. In such a scenario, there is no direct communication between the parties (e.g., this can be useful for a highly contentious matter or if the parties are not able to abide by the ground rules). This is one of many possible variations to the standard format of a joint-session mediation.

Reality Testing

Expect the mediator to do some degree of **reality testing** during the mediation. Reality testing is a tactic that mediators may use to encourage settlement. Mediators will ask questions about the likelihood of success in court, the ability to enforce a judgment, and any risks or concerns involved with not settling during mediation. From the mediator's perspective, reality testing reinforces the notion that the power is in the hands of the parties at mediation and it acts as a reminder that decision-making is outside of their control if the conflict proceeds to court. By discussing the additional legal fees or the unpredictable nature of litigation, reality testing may encourage parties to settle when the resolution is still within their own control and financially viable.

reality testing
a tactic used by the mediator in order to encourage arriving at a settlement during mediation rather than going to court

Reality testing is most common with evaluative mediation, but it is also used regularly in facilitative mediation. Much of the reality testing is conducted in private caucus so that the mediator can have direct and open communication with each party. Although it may prompt some questions and concerns from a client, representatives are advised to let the mediator do the reality testing. Ideally, representatives have already advised their clients about the strengths and weaknesses of their case, and reality testing should not catch clients by surprise.

Generating Options

The mediator will lead the participants through the option generation stage. Generating options allows everyone to *think outside of the box*. The importance of being open to unique and creative settlement options cannot be stressed enough. The outcome of the majority of court proceedings are monetary in nature, but the outcome of mediated discussions can involve many different creative solutions. In mediation, there is the potential to address the underlying issues and resolve the matter without

money actually changing hands. For example, consider a situation in which Party A lent money to his friend, Party B. If Party B is unable to pay the money back because of a recent job loss, it can cause incredible strain on the friendship. Commencing a small claims court action would not necessarily be the best option because it could put additional unnecessary stress on the relationship and still may not result in monetary compensation if Party B does not have the means to make payment. However, mediation could be helpful in this situation. There could be creative ways for Party B to settle the outstanding debt—looking after Party A's children after school instead of having them go to an after-school program, or walking Party A's dog instead of hiring a dog walker. These options would allow the relationship to continue while finding creative ways to work off the debt.

During mediation, all participants will be encouraged to brainstorm options. These options should not be limited to simply a monetary amount. As itemized by Noble, Dizgun, and Emond, non-legal remedies form an important part of the option-generating process.[9] The possibilities are endless, but could include any of the following:

- defining ways to avoid publicity
- obtaining or giving an apology
- establishing ways to maintain an ongoing business or personal relationship
- accommodating a disability in the workplace
- accommodating a cultural, religious, ethnic, or other requirement
- ascertaining methods to resolve disputes in the future
- instituting employee training programs with regard to sexual harassment, gender and disability awareness, and so on
- counselling
- accommodating gender-related requirements
- developing and instituting a sexual harassment policy
- defraying the cost of a management course
- acknowledging the damage, hurt, upset, and so on caused by the situation and its impact on the client and/or the client's family
- creating alternative methods for paying down debt or compensating an injured person

Clients should be encouraged to be open to viable settlement options and be willing to suggest other options, but they should never feel pressured into settlement. Legal representatives can assist their clients in evaluating these options. Clients should not react to any offers until they have had an opportunity to meet privately with their representative. For example, a big smile and an enthusiastic nod from a party will certainly suggest to the other side that an offer is sufficient, but the client should discuss the legal implications of the offer with their representative before showing signs that it meets their approval.

9 C Noble, L Dizgun & DP Emond, *Mediation Advocacy: Effective Client Representation in Mediation Proceedings* (Toronto: Emond Montgomery, 1998) at 17.

Settlement

Ideally, generating options will lead to offers to settle. When an offer has been presented, it is advisable to take a moment to meet privately with the client. Discuss all possible outcomes and make a recommendation, but leave the final decision to the client. If all parties are in agreement with the proposed resolution, a settlement agreement will need to be drafted.

Most mediators will refrain from drafting the actual agreement, but will facilitate the discussion of proposed terms and have one of the legal representatives take responsibility for preparing a draft of the agreement. The parties will have input on the contents of the agreement, but the agreement should always be thoroughly reviewed by the representatives. In the case of an unrepresented party, it is recommended that they be encouraged to obtain independent legal advice.

PRACTICE TIP

Dealing with Self-Represented Litigants

Remember, a legal representative must advocate exclusively for the best interests of their own client. They are not protecting the interests of the opposing party. Self-represented litigants (also known as "unrepresented parties") might not realize that this is the case and may wrongfully assume that an opposing legal representative will also look out for their interests. In order to avoid a potential misunderstanding, the nature of this relationship should be made clear to all parties at the mediation. For further tips on dealing with self-represented litigants, see the Practice Management Topics on the Law Society of Ontario website at <https://lso.ca/paralegals/practice-supports-and-resources/topics>.

It is important to note that although there are high rates of settlement, not all mediations settle. If progress is not being made, behaviours are not being controlled, or both sides believe they have a strong BATNA, it may be best for the matter to be resolved through another means. A representative must be able to recognize when a mediation should be terminated and when to recommend a different alternative to their client instead of continuing with unproductive mediated discussions.

Mediation Advocacy

The term "mediation advocacy" refers to the ability of legal professionals to present a client's position and interests in a non-adversarial manner during a mediation session. Effective mediation advocacy occurs when the representatives help to resolve the dispute by arriving at a win–win solution. This involves creating and considering creative solutions to the dispute in order to achieve a fair resolution. Legal representatives who have strong mediation advocacy skills tend to achieve better outcomes for their clients and have greater overall client satisfaction.

Tips for Effective Mediation Advocacy

1. *Consider all evidence.* Conduct appropriate legal research and also bring copies of all documents you expect to use for persuasive negotiations, including case law printouts.
2. *Be confident.* Have confidence that you have a strong case and that you are not required to settle at mediation. Consider the likelihood of success should it proceed to the hearing stage.
3. *Prepare the client.* "Groom" your client well before the scheduled mediation, including at least one face-to-face meeting prior.
4. *Listen to the mediator's assessment.* Remember that an evaluative approach to mediation means that the mediator gives each party an assessment of the strength of the claim and what might happen at a hearing. While this is not binding, it is equivalent to obtaining an "expert opinion."
5. *Negotiate in good faith.* Be very reasonable with offers and counteroffers. There tends to be an initial, phony "ratcheting up" instantly of the value of the claim. Sometimes a client will be willing to pay any amount just to have it resolved, but remember to be reasonable.
6. *Remain calm and keep focus.* It can be easy to get flustered, angry, and overly emotional if the discussions are not progressing as expected. However, it is important to stay calm and reasonable.
7. *Caucus with your client constantly.* There tends to be a lot of downtime and waiting. Use that time to anticipate upcoming offers or counteroffers. Project ahead and consult with your client to consider various scenarios that may arise.
8. *Be respectful of everyone.* Respect all staff, the mediator, the opposing parties and legal representatives, and your own client. Even the security guard who checks in the parties is a key person in the process throughout the day.
9. *Keep confidentiality.* Resist the temptation to discuss the case in the elevator or in the coffee shop. Even if your client starts asking questions, it is best to wait until you can have a private conversation.
10. *Do not be bitter and do not celebrate.* Win or lose, remember that mediation is about resolving the matter without a hearing, to the satisfaction of all parties.

Source: Adapted from Christos Draud, Licensed Paralegal, email communication (2017).

PRACTICE TIP

Mediation Advocacy

Prior to the next mediation session, Angela met with her paralegal. They decided that Angela would deliver the opening statement and the paralegal would respond to all questions that came up during mediation—unless there was something that mediator specifically asked Angela to answer. The paralegal attended the mediation with Angela, but Mary and Leo decided to represent themselves. Angela provided her opening statement which outlined how much she enjoys living in the basement apartment and that she is hopeful that the parties will be able to work together towards reaching a resolution.

Leo had tried to interrupt Angela's opening statement a number of times, but the mediator continually enforced the "no interruptions" ground rule. Next, the mediator asked Mary to provide her opening statement. Mary said that she feels sick about the situation and that she would really like to see it resolved at mediation. Leo felt as though he needed to add his own commentary to Mary's statement. Since Leo continually interrupted while his wife was speaking, the mediator suggested that they move into private caucus.

When the mediator met with Mary and Leo, the mediator pointed out that all parties are required to follow the ground rules and that interrupting is not permitted. Leo indicated that he understood and that he would try to refrain from further interruptions. The mediator then asked Mary how they would like to resolve the matter. She indicated that, prior to the first mediation, they had not realized Angela's sentimental attachment to the figure skates. They also said that although they are not willing to admit liability, they would be willing to increase their offer as a gesture of goodwill.

When the mediator met with Angela, the mediator asked how she would like the matter resolved. Angela indicated that she was not sure, but was hopeful that she could continue living in the apartment. The mediator went back and forth between the parties in private caucus before bringing everyone back together for joint session.

Mary spoke on behalf of herself and Leo. She started off with an apology and explained that they did not realize that the skates had so much sentimental value. She also indicated that she had looked into insurance coverage, but the damages would not be covered. Mary revealed that her and Leo were struggling financially, but that they would willing to reduce Angela's rent by $100 per month for the next six months, which would amount to a $600 rent reduction. As well, they offered to pay her the 1.5% interest that had been accumulating on her rental deposit.

Angela met privately with her paralegal who went through the offer, outlined the risks of taking the matter to court and ultimately recommended that she accept the offer. However, the paralegal also explained that the 1.5% interest on her rental deposit was actually required by the statute. Although it was presented as part of the offer, it is actually a landlord's statutory obligation to provide the interest payment. After discussing it with her paralegal, Angela decided to accept the offer and was happy that she would be able to continue living in the basement apartment.

They drafted a settlement agreement outlining the terms that had been discussed. Angela's paralegal reviewed the agreement for Angela and the mediator recommended that Mary and Leo obtain independent legal advice before signing. A couple of days later, the settlement agreement was signed by all parties.

Discussion of Scenario

- *Preparation for Mediation.* Angela's paralegal effectively prepared for mediation by meeting with his client and working out some of the logistics with regard to participation during the session (e.g., Angela to deliver the opening statement and the paralegal to respond to questions).
- *Speaking Sequence.* In many cases, including this scenario, the plaintiff will deliver their opening statement first. However, it is the mediator's discretion to determine the speaking sequence.
- *Opening Statement by Client.* Having Angela deliver the opening statement allowed her to provide a first-hand expression of the importance of the figure skates and it also meant that the client had already participated in a significant part

of the mediation—leaving more opportunities for the paralegal to take a lead in other parts of the session

- *Express Commitment to Settle*: Both Angela and Mary expressed a desire and/or willingness to settle the dispute through mediation. Not only is this disarming to their opponent(s), but it also reiterates the goal of mediation.
- *Interruptions*: Leo's continual interruptions were dealt with by the mediator by first reminding him of the ground rules and then by addressing the issue in private caucus when the mediator met with Mary and Leo.
- *Private Caucus*: The private caucus let the mediator address Leo's interrupting behaviour and it also allowed the mediator to find out what was really important to each side (e.g., Angela revealed that it was important for her to continue to live in the basement apartment during private caucus, but she did not state this during joint session).
- *Creative Settlement Options*: Mediation offers more flexibility in developing creative options to settle a dispute. Although Mary and Leo did not have $600 to pay Angela upfront, they structured the $600 payment as a rent reduction over six months.
- *Role of Legal Representatives*: Legal representatives play an important role in mediation because they can interpret the law surrounding settlement options and make recommendations to their client. Angela's paralegal's knowledge of the law allowed him to recognize that the interest on the rental deposit was a statutory requirement and not part of the offer. Representatives also play an important role in drafting and reviewing settlement agreements.

CHAPTER SUMMARY

This chapter introduces important considerations for effective mediation advocacy. It is essential that legal representatives engage in pre-mediation preparation, including considerations relating to appropriate timing for the mediation, a suitable mediation location, proper selection of the mediator, and the necessary preparation of documentation. Because clients take on an active role in mediation, it is important for clients to also be well-prepared and to feel comfortable.

At mediation, the mediator, the parties, and their legal representatives take on distinct roles as the matter progresses toward settlement. A solid understanding of these roles, the ground rules, and expectations for behaviour will increase the likelihood of successful discussions. Legal representatives should ensure that clients are informed of the mediation process and understand the importance of generating and assessing a variety of options.

KEY TERMS

ADR brief, **192**
agreement to mediate, **194**
joint session, **200**
opening statement, **199**
reality testing, **201**
statement of issues, **192**

REVIEW QUESTIONS

1. When is the best time to schedule a mediation session?
   a. As soon as a statement of claim is filed.
   b. As soon as the representatives have all of the necessary information and reports.
   c. A month before the trial date.
   d. Mediation is not within the paralegal scope of practice.
2. What should be considered when selecting a mediator?
   a. The mediator's training and experience.
   b. The mediator's approach to mediation.
   c. Fees and expenses charged by the mediator.
   d. There are many considerations, including training, experience, approach, and fees.
3. Which approach would ineffective for a mediation advocate?
   a. Presenting the client's interests as well as the client's position.
   b. Using plain language.
   c. Using an adversarial approach.
   d. Intervening to protect a client.
4. What should a paralegal do to prepare a client for mediation?
   a. Discuss what will be included in cross-examination.
   b. Discuss what will be included in the opening statements.
   c. No preparation is necessary because clients never attend mediation.
   d. No preparation is necessary because it would interfere with the mediator's role.
5. When is the agreement to mediate drafted by the mediator?
   a. Prior to the mediation.
   b. After the mediation has concluded.
   c. During the mediation.
   d. When settlement is achieved.
6. Who should deliver the opening statement?
   a. The legal representative.
   b. The client
   c. It is decided on a case-by-case basis.
   d. There is no need for opening statements in mediation.
7. What is a private caucus?
   a. The room in which a mediation session takes place.
   b. A part of the mediation process when the mediator meets with each party separately.
   c. A pre-mediation meeting between the mediator and the party who initiated the mediation.
   d. The term used to describe a mediation session that does not result in a settlement.

DISCUSSION QUESTIONS

Questions 1 through 6 refer to the following scenario:

Danijela needed new windows for her home. She hired Seeing Clearly Windows Ltd. because the company has a good reputation and the salesperson promised that the company would be willing to reinstall the existing shutters on her new windows.

Danijela had been told the windows would be available within four to six weeks, but the windows were not ready for three months. Further, several problems arose with the installation; for example, one of the windows was measured incorrectly so the shutters no longer fit, and one of the shutters was damaged as it was being reinstalled. Seeing Clearly Windows Ltd. has asked Danijela for an additional $1,000 to cover "unforeseen expenses" arising from the installation.

Danijela is upset that the work was not completed properly. She has refused to pay the unforeseen expenses requested by the company and has withheld 50 percent of her total bill until the issues are properly resolved. Danijela has retained a legal representative to take this matter to small claims court.

1. *Would it be appropriate to recommend mediation in this case? Why or why not?*

Scenario (continued)

Danijela has indicated that money is tight and any additional charges would have to go on her line of credit. She does not think she should have to pay anything extra to fix the problem. She is not handy and does not have any tools to do the work on her own. However, she does not like the whole neighbourhood being able to see into the rooms that have windows without shutters so she would like it resolved quickly.

The owner of Seeing Clearly Windows Ltd. was not happy to hear about the amount of money withheld by the customer and would like to resolve the matter as soon as possible. He admits that his salesperson did agree to provide these extra services and wants the customer to be happy, but he does not want to lose money.

2. *Based on the information provided so far, explain the position of each party.*
3. *Speculate on the interests of each party.*
4. *Assume that Danijela has expressed a concern that she has just started a new job and does not want to take a day off for a mediation unless it is absolutely necessary to do so. How should her legal representative respond to her concern?*
5. *What forms of objective criteria should be obtained prior to this mediation?*
6. *Danijela is very nervous about attending mediation and does not want to speak much during the mediation. Knowing that most mediators require active client participation, how can her representative make Danijela feel better about the mediation?*

EXERCISE

1. *Mediation Role Play: Dog Attack* (see Appendix A)

REFERENCES

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Appendix A Role Play: Dog Attack Mediation

Type: Mediation Advocacy Role Play

Participants: One or two mediators; two parties; two legal representatives

Level of Difficulty: Advanced

Time: Set aside approximately 70 minutes for this activity, including 20 minutes to read the roles and for legal representatives to meet with their clients prior to mediation, 40 minutes for the mediation, and 10 minutes for the debrief.

Objectives

- Allow students to practise their mediation advocacy skills as a legal representative.
- Help students gain mediation experience.
- Appreciate the challenges that can arise when parties and their legal representatives attend mediation.

Preparation

- Divide the students into groups of five or six (if there are six in a group, two students should co-mediate).
- Assign a role to each student.
- Ask students to read their roles.
- The parties should complete the ADR Worksheet for Mediation (Party).
- The paralegals should complete the ADR Worksheet for Mediation (Paralegals).
- The mediator should complete the ADR Worksheet for Mediation (Mediator).

Debriefing with Students

1. Mediators, what was it like to be a mediator for this dispute?
2. Mediators, did you find it difficult to maintain control of the process during the mediation?
3. Legal representatives, was it difficult to divide the participation with your client?
4. Parties, has it helpful to have your representative with you at mediation?
5. What was it like to work with a mediator?
6. What was the resolution?
7. Why was this a good matter to go to mediation instead of court?
8. How successful do you think this matter would have been if the parties tried to negotiate on their own without the assistance of a mediator?
9. What did you learn from this mediation that will help you in your future practice as a paralegal?

Dog Attack Dispute

Information Shared with All Roles

Several weeks ago, a large German Shepherd (Patton) allegedly attacked a small Shih Tzu puppy (Fritz). Patton is 6 years old and weighs 80 pounds. Fritz is 9 months old and weighs 7 pounds. Neither dog was supervised when the incident took place, and there were no witnesses to the alleged attack. Both owners arrived in time to see Patton grab Fritz with his mouth and lift him in the air. Fritz was taken to an emergency clinic for examination and treatment. Patton did not sustain any serious injuries, but was limping for a few days after the incident.

Both parties have retained paralegals to act as their legal representatives.

The matter is proceeding to mediation in an effort to resolve it without going to small claims court.

Role for the Mediator

Last week you contacted each of the paralegals separately to discuss the mediation process and the fact that you encourage active client participation. During the conversations, each party explained what had taken place. Just as the saying goes, there are two sides to every story.

The paralegal representing Patton's owner (Murray/Marie) has indicated that the dogs were just playing, and that if Patton wanted to harm the other dog he easily could have done so. The paralegal said that the client is upset over how the other dog owner harmed Patton, as there was no need to attack him in that way. Murray/Marie's paralegal thinks the vet bill is greatly inflated, and that the emergency service was completely unnecessary.

The paralegal representing Fritz's owner (Linh/Lynn) says that the other dog was trying kill her little Fritz. The paralegal says that the client had no choice but to attack the other dog in order to save Fritz. Linh/Lynn was very worried about her pet and felt that it was necessary to seek immediate medical attention for Fritz. Linh/Lynn does not want to be responsible for paying the vet bill.

From what you have been able to gather, both client are dog lovers and live in the same neighbourhood. I

Appendix A Continued

addition to a discussion about the vet bill, it may be useful to establish how the parties will ensure that an incident like this does not take place again. You are confident that this can be resolved without going to small claims court.

Role for the Owner of Patton: Murray/Marie

You are the owner of a friendly, well-trained, 6-year-old German Shepherd. Patton has never been aggressive to people or to other animals. Last month, you were gardening in your backyard when you noticed Patton running along the fence line at the back of your property. He was barking and clearly excited about something on the other side of the fence. You could not see what he was barking at because of a large hedge on your side of the fence. After a few minutes, Patton managed to squeeze through a small area of the fence that had been damaged in a recent wind storm. At that point, you lost sight of him but ran to the end of your property to call him back.

It turned out there was a small dog on the other side of the fence. This came as a surprise to you, because you know the owner of that house and he does not have pets. When you got to the edge of the fence you saw Patton playing with a small dog and a person screaming while kicking and hitting Patton. As soon as you whistled and called Patton, he stopped playing and came back to your yard.

Patton was limping for a few days after the incident—probably from the angry pet owner who hit and kicked poor, playful Patton. You were surprised when you were served with a Plaintiff's Claim documenting the injuries to the other dog. You have retained a paralegal who has suggested community mediation to try to resolve this matter without going to court.

Role for the Paralegal Representing Patton's Owner

You are a newly licensed paralegal who believes that ADR is the best way to resolve disputes. In fact, you are considering becoming a mediator one day, so you are eager to participate in this mediation session.

After reviewing the Plaintiff's Claim, you feel that the amount of money being sought is excessive for a few scratches from a couple of dogs playing together. You do not believe the other dog needed to go to a vet, let alone an expensive emergency clinic. How can anyone be sure that these were not pre-existing scratches on the dog? You are not an animal person and you do not understand all the fuss, or why anyone would spend that kind of money on a dog. However, you are trying to do what is best for your client.

If necessary, you think that you could successfully defend this claim in small claims court, and would even would consider countersuing for Patton's injuries. You would prefer to resolve it at mediation, though. You recognize that there are no real witnesses to this case, and that it may be hard to prove either dog's injuries.

Role for the Owner of Fritz: Linh/Lynn

You are the owner of a tiny Shih Tzu puppy. Fritz is only 9 months old and is a very gentle, passive dog. Last month, your son accidently let Fritz slip out the back door. You did not realize that Fritz was outside until you heard a lot of barking coming from a house down the street. When you went to investigate, you saw a large, aggressive dog with his jaws clamped around Fritz. The dog was at least ten times the size of your puppy, and could have easily killed Fritz. You ran as quickly as you could to save Fritz's life, but you had to hit and kick the other dog several times before he would drop your puppy. At this point you saw the other dog's owner peeking over a fence and calling for the big dog.

You immediately took Fritz to an emergency vet clinic to have her examined. There were visible scratches, as well as bruising. The vet was extra cautious and conducted an ultrasound to see if Fritz had any internal injuries. The ultrasound was clear, so the vet recommended IV antibiotics and a special cream to ensure that no infection developed. The emergency clinic charged $1,275 for the examination, ultrasound, antibiotics, and cream. You knew that the emergency clinic would charge far more than your regular vet, but you felt this was a crisis. Besides, Fritz is worth every penny. Unfortunately, you do not have money to pay the vet and have decided to try to recover the vet expenses from the other dog owner in small claims court. You have retained a paralegal who served a Plaintiff's Claim on the dog owner.

Appendix A Continued

Your paralegal has recommended that you consent to the other party's suggestion to try community mediation to see if you can resolve this matter without going to court.

Role for the Paralegal Representing Fritz's Owner

You have been a paralegal for almost 20 years, and you were grandfathered in by the Law Society of Ontario to gain your P1 Licence. You have established a name for yourself in animal rights and are known to be successful in arguing dog injury cases. You have reluctantly agreed for this matter to go to community mediation. While you prefer litigating matters in court, your client needs the money as soon as possible, and it would be several months before you get a court date in small claims court.

The lack of witnesses means this is not the strongest case you have taken on, but you think that your stellar reputation will help you get a significant portion of what is being claimed. You are a little concerned about an allegation that your client had attacked the other dog, but you are prepared to explain the client's actions should that issue come up at mediation.

You have contemplated reporting this incident to the local municipality in order to have charges laid under the town's animal control by-law if this is not resolved at mediation. However, as an animal lover, you would hate to see a muzzle order put on the other dog unless it was absolutely necessary.

ADR Worksheet for Mediation
Dog Attack Dispute: Party

My Position ~ What am I seeking?

1. _____

My Interests ~ Why am I seeking what I am seeking? What I really care about (i.e., my wants, needs, concerns, hopes and fears)

1. _____
2. _____
3. _____
4. _____

Opposing Party's Position ~ What do I think they are seeking?

1. _____

Opposing Party's Interests ~ Why are they seeking what they are seeking? What I think they really care about (i.e., their wants, concerns, hopes and fears)

1. _____
2. _____
3. _____
4. _____

Options ~ Possible agreements that we might reach.

1. _____
2. _____
3. _____
4. _____
5. _____

Objective Criteria/Legitimacy/Proof ~ External standards or precedents that will help us to assess any options (e.g., market value, precedents, scientific judgment, professional standards, costs, what a court might decide, moral standards, expert opinions, equal treatment, or tradition). *Be specific to the scenario.*

1. _____
2. _____

BATNA (Walk Away Alternative) ~ What can I do if I walk away without agreement? What is my back up plan? What is my next step?

1. _____
2. _____
3. _____

ADR Worksheet for Mediation
Dog Attack Dispute: Paralegal

My Client's Position ~ What is my client seeking?

1. _____

My Client's Interests ~ Why is my client seeking what they are seeking? What they really care about (i.e., their wants, needs, concerns, hopes and fears).

1. _____
2. _____
3. _____
4. _____

Opposing Party's Position ~ What do I think they are seeking?

1. _____

Opposing Party's Interests ~ Why are they seeking what they are seeking? What I think they really care about (i.e., their wants, concerns, hopes and fears).

1. _____
2. _____
3. _____
4. _____

Options ~ Possible agreements that we might reach.

1. _____
2. _____
3. _____
4. _____
5. _____

Objective Criteria/Legitimacy/Proof ~ External standards or precedents that will help us to assess any options (e.g., market value, precedents, scientific judgment, professional standards, costs, what a court might decide, moral standards, expert opinions, equal treatment, or tradition). Be specific to *the scenario.*

1. _____
2. _____

BATNA (Walk Away Alternative) ~ What will I recommend to my client if we walk away without agreement? What is our back up plan? What is our next step?

1. _____
2. _____
3. _____

Appendix A Continued

ADR Worksheet for Mediation
Dog Attack Dispute: Mediator

Position: Party A – What do I think they are seeking?
What is Party A's position? *Please identify who is Party A.*
1 _____

Position: Party B – What do I think they are seeking?
What is Party B's position? *Please identify who is Party B*
1 _____

Interests: Party A – Why are they seeking what they are seeking? What I think they really care about (i.e., their wants, concerns, hopes and fears)
What are Party A's interests?
1 _____
2 _____
3 _____
4 _____

Interests: Party B – Why are they seeking what they are seeking? What I think they really care about (i.e., their wants, concerns, hopes and fears).
What are Party B's interests?
1. _____
2 _____
3 _____
4 _____

Speaking Sequence
Who will I ask to speak first? Why?
1. _____
_____

Appropriateness of Mediation
Why will mediation be an appropriate way to deal with this dispute?
1. _____
_____

Obstacle to Settlement
What will be the greatest obstacle to achieving a win–win settlement?
1. _____
_____

Source: Adapted from R Fisher & D Ertel, *Getting Ready to Negotiate: The Getting to Yes Workbook* (New York: Penguin, 1995).

What Is Arbitration?

9

Learning Outcomes

After reading this chapter, you will be able to:

- Define arbitration and its various forms.
- Distinguish arbitration from other approaches to dispute resolution.
- Determine whether arbitration is a desirable method for a given dispute.
- Assess how a party is best represented in an arbitration hearing.
- Appreciate the benefits and consequences of arbitration.
- Apply the concepts from this chapter to a recurring conflict case scenario.

Introduction

From previous chapters, you have had the opportunity to understand the nature of conflict, the act of negotiation, and the process of mediation. This chapter turns to the form of alternative dispute resolution (ADR) that comes closest to appearing as litigation. In many ways, arbitration—a private and less formal version of what occurs in the courtroom—mimics our preconceptions of judicial decision-making. Arbitrators hear evidence. Arbitrators deliberate. Arbitrators interpret the law. Arbitrators decide cases.

The question is: When does arbitration make the most sense for disputants? In this chapter, you will discover how arbitration is distinguished from courtroom litigation, how arbitrators are selected, how disputants are represented in arbitration, and the obligations that arbitrators have to the disputants.

What Is Arbitration?

arbitration
a process that occurs before an arbitrator, someone who is not a judge but is a non-partisan third party selected by the disputants, who, after hearing the submissions of both parties, makes a final and binding decision in the dispute

arbitration award
a decision or determination on the merits made by an arbitrator at an arbitration tribunal (also referred to as *arbitral award*)

Arbitration is a form of ADR that resolves disputes outside of the courtroom. It is a process that occurs before an arbitrator, someone who is not a judge but is a non-partisan third party, who, after hearing the submissions of both parties, makes a decision in the dispute. The arbitrator's decision or **arbitration award** is often deemed to be final and binding on those parties and enforceable by the courts. The arbitrator is selected through the joint consent of the parties. Depending on the nature and complexity of the dispute, parties are often represented by legal representatives. It is court-like, yet it is not litigation. Despite having similar elements that resemble a traditional court proceeding, there are also many differences. The chart below lists some of the more obvious differences between litigation and arbitration.

	Litigation	Arbitration
Type	Trial	Hearing
Adjudicator	Judge	Arbitrator
Venue	Court of Law	Mutually decided venue (in person or virtual)
Parties	Plaintiff and Defendant	Claimant and Respondent
Decision	Court Decision	Award
Accessibility	Open Court to public	Private
Appeal	Appeal	Limited Appeal or Judicial Review

Distinguishing Arbitration from Other Forms of Dispute Resolution

As we said in Chapter 5, What Is Negotiation?, negotiation does not involve a third party in the resolution of conflict; the parties reach settlement without the assistance of a neutral outsider. In contrast, arbitration and mediation involve a neutral third party to achieve an outcome to a dispute. But these two approaches differ in one significant way: mediators *assist* the parties in achieving a decision that resolves their dispute; arbitrators *impose* on the parties a decision that they agree to accept as binding and final. Like mediation, arbitration can be used for a wide range of conflicts, including civil, commercial, employment, and family matters, as well as in private disputes, administrative tribunals, and many other areas. But unlike mediation, arbitration becomes the preferred method of ADR when the parties are unable to come to an outcome on their own accord due to any number of reasons, such as the complexity of the facts that are in dispute, the sophistication of the principles of the law at issue, or the non-existence or deterioration of the relationship between the parties.

How Parties Arrive at Arbitration

As you gain an understanding that ADR empowers disputants, you will note that rather than being burdened by the often-oppressive nature of court rules and procedures, parties can maintain their authority and independence by agreeing to achieve resolution without court intervention. In a negotiation, parties settle after engaging in dialogues and in a process that allows each side to understand the other's issues, and by arriving at a compromise or a collaborative outcome. In a mediation, disputants use a process similar to negotiation to achieve settlement, with the notable distinction of being aided by the facilitation of a third party.

Parties who continue in their quest to avoid formal litigation find that arbitration is the escalation of one or both of these two methods; neither negotiation nor mediation has been successful. Accordingly, after the disputants have exhausted options that would otherwise create a decision to settle, they may resort to, or be required to begin, this private adjudicative process. They can either arrive there by being compelled by statute, or, in the absence of a statute, consent to the process through an arbitration agreement. For example, parties who are in a relationship arising from a main contract can anticipate arbitration by inserting a clause within that initial contract. These methods of achieving arbitration are depicted in Figure 9.1.

By Statute

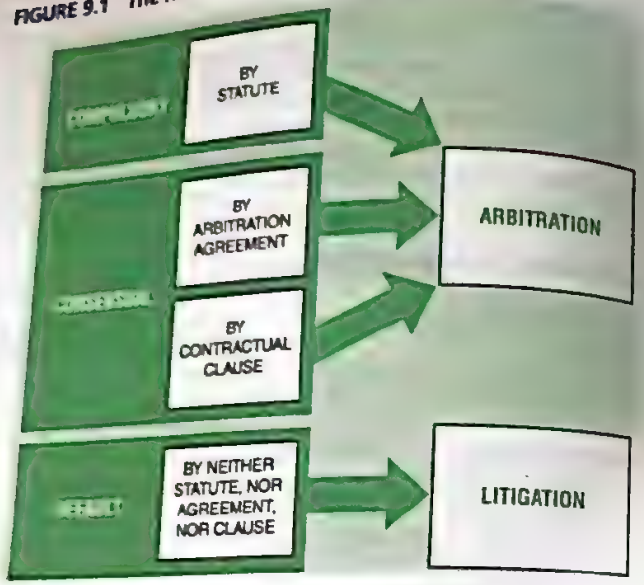
compulsory arbitratio
a form of arbitration that mandated by legislation

In some areas of law, arbitration (or other forms of adjudication) is mandated by legislation. This form of arbitration can be referred to as **compulsory arbitration**. Likely as a form of public policy or governance, legislatures have acknowledged what private parties often conclude on their own—courts are slow and expensive. Judges, who are by their nature often generalists, can lack the expertise needed to arrive at an artful decision in a specific area. Judges also are constrained by the common law or by statute in being able to achieve creative solutions. In such cases, legislatures have enacted statutes that mandate that the parties bypass litigation and instead make their case before an adjudicator who is given jurisdiction under that particular statute.

Often this mandate is characterized as the realm of administrative law. For instance, under Ontario *Human Rights Code*,[1] parties must make their case before the Human Rights Tribunal if they fail to arrive at agreement through negotiation or the statute's mediation process. The tribunal itself does not consist of a panel of arbitrators, yet its

1 RSO 1990, c H.19.

FIGURE 9.1 The Route to Adjudication



function can be seen to be similar. More closely resembling arbitration is the adjudication process found in the statute regulating federal workers, the *Canada Labour Code*.[2] Under this federal statute, when a dispute arises stemming from the termination of a federally regulated employee, the complainant can opt for a hearing before an adjudicator under the Code. Ontario's *Residential Tenancies Act, 2006*[3] is another piece of legislation that favours its own adjudicative process over that of the courts.

Perhaps the classic example of arbitration—and arguably its genesis as a respected and stable option for conflict resolution—is in the realm of labour relations where unionized workplaces rely on this form of adjudication to resolve conflicts and maintain stable workplaces and longstanding relationships. Ontario's *Labour Relations Act, 1995*[4] is perhaps the most established enshrinement of arbitration as law; it has been in effect in its original form since 1948. Management and unions have coexisted under a statutorily enforced understanding that they avoid the courts and use arbitration to resolve disputes that they are unable to settle on their own. Ontario's Ministry of Labour facilitates the arbitration process by maintaining a roster of arbitrators and providing a statutory mechanism for expediting arbitration under certain circumstances. Management and unions adhere to this form of dispute resolution, and they turn to the Ministry of Labour for facilitation when they cannot manage to find an arbitrator unaided. However, they more often embed in their agreements a mechanism to select an arbitrator without the ministry's assistance.

2 RSC, 1985, c L-2.

3 SO 2006, c 17.

4 SO 1995, c 1, Sch A.

By Agreement

Not all disputants have the benefit of a statute or government body to guide them in adjudication outside of the courtroom. Yet these disputants may also appreciate the benefits that an arbitration would provide: a fast, less expensive, potentially confidential resolution from an experienced, neutral third party. Without a statute, it is still possible for these disputants to circumvent the litigation process using either a separate arbitration agreement or a clause within the main contract that is referred to as a ***Scott v Avery* clause** (based on a decision in an 1856 British case[5]). In either case, it is a contractual method that signifies an agreement to avoid litigation and instead opt for arbitration. In fact, it can be quite common for parties to use this method to circumvent litigation, and clauses such as these are used with increasing frequency. This form of arbitration can be referred to as **consensual arbitration**. These arbitrations can be conducted under the supervision of an arbitral institution (such as the ADR Institute of Canada, discussed below) and can be completely independent of any statute or governing body (in such circumstances, they are referred to as **ad hoc arbitrations**). Yet, even with the intention of avoiding the court's adjudication, there can still be oversight relating to these private proceedings. Legislation, entitled the ***Arbitration Act*,**[6] exists in most jurisdictions to provide this oversight and governance. The nature of the *Arbitration Act* will be discussed below.

Scott v Avery clause
a clause in an agreement that is included in a contract that is intended to avoid litigation by proceeding to arbitration (named after a decision in an 1856 British case)

consensual arbitration
a form of arbitration that is arrived at by consent of the parties as a means to circumvent litigation (also referred to as *ad hoc arbitration*)

ad hoc arbitration
a form of arbitration that is arrived at by consent of the parties as a means to circumvent litigation and that is completely independent of any statute or governing party (also referred to as *consensual arbitration*)

Arbitration Act
legislation that informs the parties about the nature of consensual adjudications, including how they are composed, the scope of the arbitrator's decision-making powers, how decisions are enforced, and the threshold upon which to appeal these decisions

To arrive at an ad hoc arbitration as opposed to litigation, the parties will have ideally created a clause in their agreement or contract at the inception of their relationship. The possibilities for such an agreement are endless: commercial agreement, partnership agreement, lease agreement, agreement of purchase and sale, international licensing agreement, and more. Essentially, this approach is affected by a clear statement among the legal contractual terms, agreed to by the parties, that disputes about the contract are argued before an arbitrator and that the arbitrator's decision is deemed to be final and binding (earlier referred to as a *Scott v Avery* clause). An arbitration clause in a contract can take many forms. The following example of a template for an arbitration clause is provided by the ADR Institute of Canada:

> All disputes arising out of or in connection with this agreement, or in respect of any legal relationship associated with or derived from this agreement, will be finally resolved by arbitration under the Arbitration Rules of the ADR Institute of Canada, Inc. [or the Simplified Arbitration Rules of the ADR Institute of Canada, Inc.] The Seat of Arbitration will be [specify]. The language of the arbitration will be [specify].[7]

As shown in the preceding template clause, a contractual reference to opting for arbitration as opposed to litigation has several components. The first is to make a clear statement that the path for any disputes under the contract in question is to an arbitrator and that the decision of that arbitrator is final and binding. The second is to determine aspects of the arbitration process: where it is to be held, what jurisdictional laws are to govern that procedure, who will bear the financial burden of the process (usually it is shared equally between the parties), and potentially who (the individual or the organization) is to hear that arbitration.

5 *Scott v Avery*, [1834-60] All ER Rep 1, 5 HL Cas 811.

6 1991, SO 1991, c 17.

7 "ADRIC Arbitration Rules," online: *ADR Institute of Canada* <http://adric.ca/arbrules>.

Arbitration clauses that appear in the contract that formulates the agreement or relationship between the parties, by their very nature, must be contemplated as the relationship begins. In other words, the parties predetermine or anticipate the process they will use in advance of any dispute. But not all parties are so proactive. Perhaps they have no arbitration clause to resort to in the event of a dispute. In these circumstances, the disputants can still decide to bring their issue before an arbitrator. To do so, they can sign an entire arbitration agreement at any time prior to entering litigation or with a similarly worded *Scott v Avery* clause inserted into the main agreement. The failing of this after-the-dispute approach is that often when parties have entered into conflict, especially one that is emotional or complex, they are less inclined to agree on terms. There is little to which the parties are interested in agreeing. They may dispute the format of the arbitration, or the jurisdiction, or any other aspect of the attempt at resolution. It is best, then, to anticipate the possible need for arbitration and agree on its format at the inception of the relationship and the contractual agreement.

KEY CASE REGARDING ARBITRATION AGREEMENTS

***TELUS Communications Inc v Wellman*[8]**

The plaintiff, Avraham Wellman, commenced a class action law suit in Ontario against TELUS Communications, a well-known Internet and phone provider across Canada. The plaintiffs were alleging that in calculating cell phone usage for billing purposes, the phone company rounded up any incomplete minute of talk time to the next minute (a call lasting three minutes and one second would count as four minutes, for example). Approximately 2 million TELUS subscribers, including both consumer and business customers, were potentially affected by this method of billing. The main issue to be considered by the Supreme Court of Canada involved the service contract entered into by TELUS and each of its customers that contained an arbitration clause requiring that any contractual disputes be resolved by binding arbitration. TELUS conceded that the Ontario *Consumer Protection Act, 2002*[9] invalidated the arbitration agreement for consumers. However, the court found that the 600,000 business customers did not qualify as consumers and therefore were bound by the arbitration agreement that they entered into through their service contract.

Who Can Act as a Representative in Arbitration?

The question of who can represent clients at an arbitration is a somewhat murky area and dependent on the nature of the dispute, whether it is governed by a specific statute or the regulations of a governing body for legal representatives, including lawyers and paralegals. As in the courtroom, parties have the ability and right to defend themselves in an arbitration without a legal representative. This does, in fact, occur with likely the same frequency that it does in the courtroom. In labour disputes in unionized workplaces, management and/or the union may employ representatives who are not necessarily licenced by a provincial law society but who have some expertise in the field. But as the area of law intensifies in complexity or as the risk of loss becomes of greater concern, parties should opt to forgo self-representation and instead choose to have specialized representatives. Lawyers typically are selected for this role.

But the question emerges: Are paralegals in Ontario eligible to represent clients in arbitration proceedings? The answer to this question is not clearcut. Paralegals have had a prior history of representing clients in arbitrations before the Financial Services Commission of Ontario (FSCO), (although it has now changed to a new agency and format). And if paralegals were to be employed by a union or a member of management, they could appear before arbitrators in a labour dispute. But what of ad hoc or consensual arbitrations? The Law Society of Ontario (LSO) appears to leave that option open, potentially allowing paralegals to appear before arbitrators.[10] The scope of practice for paralegals set out in the by-laws of the *Law Society Act*[11] includes the right of paralegals to appear before tribunals, which includes arbitral tribunals. In addition, there is nothing in the *Arbitration Act* that places a monetary limit on a paralegal's representation in arbitration hearings. For example, there is no monetary limit at the Human Rights Tribunal of Ontario where paralegals can, and do, represent clients.

How Are Arbitration Proceedings Regulated?

Because arbitrators are not regulated in the way that judges are in our courts, it is instructive to turn to methods that can govern an arbitrator's behaviour. After all, if the purpose of selecting arbitration over a public trial is to seek an effective process, the parties must be confident that justice is achieved with fairness and impartiality.

Arbitrators are not representing a public body and are not, at least in most circumstances, endorsed or certified by a public governing body (with the exception of arbitrators selected by the Ontario Ministry of Labour). However, there are organizations in Canada that govern individuals in the field of ADR and arbitrators in particular. The most prevalent one is the ADR Institute of Canada, which provides training and furnishes its membership with guidelines and rules that govern those members (see <http://adric.ca/arbrules/>). The table of contents for these rules is included as Appendix A to this chapter.

The ADR Institute suggests that the insertion of an arbitration clause (similar to its template language mentioned above) mandates the rules that govern an arbitrator's conduct and adds specificity beyond the terms of any relevant *Arbitration Act*.

Becoming an Arbitrator

Many people are surprised to learn that there are no universally prescribed rules for becoming an arbitrator. This is probably due to the private nature of most arbitrations; as long as both parties have the confidence and trust to select an individual, that person is seen to be an arbitrator. However, for the parties to acquire that confidence and trust, the arbitrator likely has developed a reputation as an expert in the field in question; for example, an arbitrator adjudicating a dispute about an international shipping agreement would likely have knowledge about shipping and would also likely have knowledge about the enforcement of contractual agreements.

Because most commercial disputes revolve around the application of the law, most arbitrators are lawyers. Beyond gaining the trust and confidence of the parties as an

8 2019 SCC 19.

9 SO 2002, c 30.

10 M Hassell, "Speaker's Corner: Let Paralegals Act in Arbitration Matters," *Law Times News* (15 June 2015), online: <https://www.lawtimesnews.com/archive/speakers-corner-let-paralegals-act-in-arbitration-matters/261762>.

11 RSO 1990, c L.8, s 62(0.1), By-law 4.

expert in the field, arbitrators must also be seen to be neutral and unbiased. To this end, both parties will need to feel confident that the arbitrator can see a dispute from either side. For this reason, arbitrators are often elevated to that role by having a reputation among their network as fair-minded. Accordingly, many arbitrators are retired judges. As an example of the prevalence of seasoned experts and judges in the field of arbitration, a widely recognized source of arbitrators is an organization called ADR Chambers (see <http://adrchambers.com>).

Because there are no limitations or credential requirements to becoming an arbitrator, conceivably anyone can call themselves an arbitrator. Indeed, an Internet search would reveal that there are many arbitrators selling their services. But it is quite another thing for an individual to be busy enough to earn a living as an arbitrator. To this end, arbitrators need to be seen not only as expert and trustworthy but also as effective in their adjudicative role. Arbitrators develop that reputation by demonstrating a record of well-reasoned decisions. Repeat customers want some sense that the arbitrator makes balanced decisions and does not favour one point of view; otherwise, the losing party from the previous decision will be reluctant to choose the arbitrator on a repeat basis. Some arbitrators respond to this pressure by actually alternating their decisions to gain favour from both parties. Others hope that a principled approach to decision-making will gain them a reputation as being fair and just.

Outside of the ad hoc arbitrations, there are instances where the arbitrator needs to be certified and approved by a governing body. The Ontario Ministry of Labour plays that role for legislatively expedited issues that arise in unionized workplaces, and there is a rigorous application process to be an approved arbitrator.

The Arbitration Act and the Role of the Courts

We are gaining an understanding that parties see value in ADR solutions to conflict, that they are seeking methods of settling disputes outside of the confines of the court system. However, in arbitration, there may still be a role for the court to play. This role is outlined in Ontario's *Arbitration Act, 1991*. Essentially the purpose of the Act is twofold. First, it provides structure and fairness to any arbitral proceedings that stray from the basic principles of administrative law. Second, it provides clarity to the court system in that arbitrations are an enshrined and legitimate method for resolving disputes in a manner that ensures that the judiciary will not unnecessarily interfere with the proceedings. More specifically, the Act informs the parties about the nature of such consensual adjudications including how they are composed, the scope of the arbitrator's decision-making powers, how decisions are enforced, and the threshold upon which to appeal these decisions. The box below, "Features of Ontario's *Arbitration Act*," reviews some of the highlights of the law. Key excerpts from the *Act* can be found in Appendix C of this Chapter.

FEATURES OF ONTARIO'S *ARBITRATION ACT*

Definition: An arbitration agreement is defined as an agreement by which two or more persons agree to submit to arbitration a dispute that has arisen or may arise between them.

Application: The Act applies to an arbitration conducted under an arbitration agreement. If there is another Act that governs the arbitration, this Act would apply with modification while the other Act or regulations prevail.

Varying the Act: The parties to an arbitration agreement may agree, expressly or by implication, to vary or exclude any provision of the Act except the following provisions: *Scott v Avery* clauses, equality and fairness, extension of time limits, setting aside award, declaration of invalidity of arbitration, and enforcement of award.

Source: An arbitration agreement may be an independent agreement or part of another agreement.

Revocation: An arbitration agreement may be revoked only in accordance with the ordinary rules of contract law.

Court's Role: No court shall intervene in matters governed by the Act, except for the following purposes, in accordance with the Act:

1. to assist the conducting of arbitrations,
2. to ensure that arbitrations are conducted in accordance with arbitration agreements,
3. to prevent unequal or unfair treatment of parties to arbitration agreements, and
4. to enforce awards.

Jurisdiction: The arbitral tribunal may determine any question of law that arises during the arbitration; the court may do so on the application of the arbitral tribunal, or on a party's application if the other parties or the arbitral tribunal consents.

Composition: If the arbitration agreement does not specify the number of arbitrators who are to form the arbitral tribunal, it shall be composed of one arbitrator.

Impartiality: An arbitrator shall be independent of the parties and shall act impartially.

Jurisdiction: An arbitral tribunal may rule on its own jurisdiction to conduct the arbitration and may in that connection rule on objections with respect to the existence or validity of the arbitration agreement.

Equity: In an arbitration, the parties shall be treated equally and fairly.

Arguments: Each party shall be given an opportunity to present a case and to respond to the other parties' cases.

Proceedings: The arbitral tribunal shall determine the time, date, and place of arbitration, taking into consideration the parties' convenience and the other circumstances of the case.

Enforcement: The court may enforce the direction of an arbitral tribunal as if it were a similar direction made by the court in an action.

Evidence: The arbitral tribunal may conduct the arbitration on the basis of documents or may hold hearings for the presentation of evidence and for oral argument; however, the tribunal shall hold a hearing if a party requests it.

Appeal: If the arbitration agreement does not deal with appeals on questions of law, a party may appeal an award to the court on a question of law with leave, which the court shall grant only if it is satisfied that,

1. the importance to the parties of the matters at stake in the arbitration justifies an appeal, and
2. determination of the question of law at issue will significantly affect the rights of the parties.

Similar laws exist in most jurisdictions across Canada. In addition to Ontario, they exist in British Columbia, Alberta, Saskatchewan, Manitoba, New Brunswick, Prince Edward Island, Nova Scotia, Newfoundland, Yukon, Northwest Territories, and Nunavut. Federally, there is a *Commercial Arbitration Act*,[12] and select provinces have enacted international commercial arbitration acts.

The Main Steps in an Arbitration

As an arbitration is the most formal of the three ADR processes that are the subject of this text (the others being negotiation and mediation), it is understandable that there would be defined steps to the proceedings. Though the details of these procedural steps may vary depending on the nature of the parties and the area of law, they share three distinct stages: before the hearing, at the hearing, and after the hearing (the arbitrator's decision). In many ways, these steps mirror the procedures in litigation, but with less formality. These steps will be discussed in more detail in Chapter 10, Advocacy for Arbitration.

Before the Hearing

As you prepare for an arbitration hearing, you must contemplate issues of process (such as who will be selected as arbitrator and the timing and location of the proceedings), issues of factual and legal substance (such as assembling the evidence, both documentary and oral; contemplating the main issues that will form the basis of the argument; and preparing witnesses), and issues of relationship (keeping the lines of communication open with the adversary in the event that the issue can still be settled amicably ahead of the hearing). Depending on the needs of the arbitrator, there may be preliminary matters to attend to, such as filing documents (for example, a briefing document). There may also be preliminary objections to consider, such as the jurisdiction. In some cases, the parties may be able to jointly agree to a statement of facts that are not in dispute and in so doing can greatly decrease the amount of time the hearing requires.

At the Hearing

As mentioned above, the pattern of an arbitration closely mirrors that of litigation. Each starts with opening statements from the parties, proceeds to matters of evidence, and finishes with legal arguments. Evidence is elicited through documents and witnesses. Witnesses may be excluded prior to their taking the stand and being sworn in by the arbitrator. Witnesses are first examined in chief, then cross-examined, and then re-examined on reply. Similarly, legal arguments are made in chief and then in rebuttal.

After the Hearing: The Arbitrator's Award

Once the evidence and legal arguments have been completed, the hearing now turns to the arbitrator who will make a decision called an *arbitral award* or *arbitration award*. The award is usually delivered in writing with reasons. However, this many depend on the jurisdiction and type of matter being arbitrated. In some instances, the parties may have agreed to an arbitration award to be delivered orally and without reasons as it can be less costly. Recall that an arbitrator's award is final and binding, usually not subject to appeal, and rarely successfully judicially reviewed by the courts. The courts give deference to properly constituted arbitration panels and are likely to overturn a decision only if it is deemed patently unreasonable. As a result, it is much more likely that the parties receive the written decisions from the arbitrator, interpret them, and heed them by paying the ordered compensation or following through on any other orders or damages that are awarded. If the losing party does not respect the decision of the arbitrator and fails to comply with the award, the winning party can turn to the courts to enforce the award (addressed in the *Arbitration Act*).

The Importance of Neutrality

The success of an arbitration proceeding hinges on the parties' faith in the ability of the arbitrator to make a decision that is seen to be wholly objective based on the arbitrator's perceived and actual neutrality. The *Arbitration Act* expressly states that it is a duty of an arbitrator to be independent of the parties and to act impartially. Not only is this an essential feature because it is mandated by statute, but also it is a matter of practicality because an arbitrator is unlikely to be selected by parties that do not perceive this impartiality. The Act also stipulates that arbitrators have an obligation to promptly disclose any circumstance both before and during a proceeding that would give rise to an apprehension of bias.

An Arbitrator's Ethical Obligations

As we noted earlier, in many instances, arbitrators go wholly unregulated given the private nature of their business. Parties who select these individuals entrust their disputes to them and expect that they are acting fairly and objectively. But unless arbitrators are governed by an association, governing body, or employer that oversees their behaviour, they are on their individual honour to act in the best interests of the disputants. Because many arbitrators are legal counsel, they also have an ethical obligation under the provincial law society in which they are a member. An association such as the nationally recognized ADR Institute of Canada requires its membership to follow its prescribed "Code of Ethics" (reproduced in Appendix B to this chapter). This code ensures that the arbitrator acts with integrity, is qualified in the subject matter, and discloses any conflict of interest in the dispute, among other things.

12 RSC 1985, c 17.

Appropriate Issues for Arbitration

Having gained an understanding of the process of arbitration, the expectations of arbitrators, and the rules that govern them, legal professionals must now gain the ability to assess whether a particular dispute is appropriate for arbitration. As we have noted throughout this text, ADR has a number of desirable characteristics. Litigation is expensive, time-consuming, and constraining in terms of formalities, remedies, and publicity. Moreover, the intensity of the litigation process can be hard on relationships. In many circumstances, resolving disputes through negotiation is preferable. And if negotiation cannot achieve results, mediation can still allow the parties to achieve a desirable settlement with the help of a facilitator. If either of these two processes fails to achieve desired results, but there is still an interest in avoiding the costs of litigation, in expediting the decision, or in achieving a creative remedy that is not available to the courts under the common law or the rules of civil procedure, then it is very likely that arbitration will be seen to be attractive.

There are numerous options available to the parties in selecting an arbitration that best fits their circumstances. Some parties may choose **Last Best Offer Arbitration** (also known as Pendulum Arbitration or Final Offer Arbitration) where the arbitrator is restricted to imposing an award based on which of the two opposing parties have the more reasonable position. **High-Low or Bracketed Arbitration** restricts the arbitrator to render an award based on advance limits set by the parties. For example, if the parties decide on an award that is lower than the low limit set by the parties, the party would be bound only by the lower limit. **Non-Binding Arbitration** might be selected by parties who want to retain their right to go to court while also providing an independent assessment of the case. Arbitration still preserves the confidentiality of the dispute. Arbitration is more likely than litigation to assist the parties in maintaining a positive relationship. Arbitration also is an attractive option when the variables relating to venue or to jurisdiction may complicate resolving a dispute—for example, international agreements add a level of complexity in terms of what laws of which nation apply. A properly framed arbitration agreement can simplify these issues by establishing the rules by which the two parties will abide.

Last Best Offer Arbitration
a term of the arbitration wherein the arbitrator must decide which of the two parties has a more reasonable position and render its award based on that (also known as Pendulum Arbitration)

High-Low or Bracketed Arbitration
a term of the arbitration wherein the parties agree in advance to the limits within which the arbitral tribunal must render its award

Non-Binding Arbitration
a term of the arbitration wherein the arbitration award is not binding and the parties retain the right to go to court; often used as an independent assessment of the case

However, there may be instances where litigation is seen to be preferable to arbitration. Perhaps the nature of the dispute is better aired in the public. One of the parties may want to have a precedent setting case by the courts to hold the opposing party publicly accountable. Or perhaps prohibitive costs that are associated with litigation are the deterrent the parties need in order to encourage them to settle their dispute through negotiation or mediation. Or perhaps the formality of the courts is more trusted by parties who do not have a long-standing and integrated relationship.

PRACTICE TIP

Assessing Whether Arbitration Is Right for the Client

- Has the client already tried negotiation and/or mediation but has been unsuccessful in attaining settlement?
- Is the client looking for a process over which they have more control?
- Does the client value maintaining the confidentiality of the dispute?
- Is the client seeking a creative remedy that is not available from a court?
- Would the client like to have input over who will adjudicate their dispute?
- Would the client prefer an adjudicator with a level of expertise not usually encountered on the court bench?

If the answers to most of these questions are in the affirmative, and assuming the other party in this relationship is also agreeable, it is likely arbitration is a suitable approach for the client.

Benefits and Consequences of Arbitration

Depending on the preferences of the disputants, there are multiple benefits to selecting arbitration over litigation, especially in the area of cost and time savings. In most cases, an arbitration can be scheduled much sooner than a trial. However, that is not always the case. The timing of the arbitration may depend on the availability of the arbitrator, particularly when selecting one based on their area of specialization and expertise. The cost of the arbitration, which includes the hearing room and arbitrator, are shared by the two parties, unlike litigation where cost of the courtroom use, judge, and court staff are paid for by the taxpayer. Arbitrators may charge an hourly rate of anywhere between $250 to $1,000 per hour and the use of the hearing room for a half day or day may range from $1,000 to $2,000 per day. There are several options available to parties for a variety of fees, including expedited hearings, written hearings with or without reasons, and non-binding arbitrations. However, arbitration can be inferior to settling a dispute by negotiation or mediation for these same reasons; arbitration is more costly and time-consuming. Arbitration is slightly more flexible in terms of process in comparison to litigation, but much less flexible than mediation (and significantly less flexible than negotiation). The value of selecting an expert adjudicator over an appointed judge in a court cannot be overstated when the circumstances of a dispute are complex and specific. And the value of privacy in matters between disputants in a competitive environment or where publicity could be harmful is a big draw to arbitration over litigation. Figure 9.2 presents a comparison of the benefits and drawbacks of arbitration versus negotiation and/or mediation and litigation.

KEY CASE REGARDING THE COSTS OF ARBITRATION

Uber Technologies Inc v Heller[13]

David Heller was a driver for Uber Eats, a food delivery service app that allows customers to order from restaurants for delivery. Heller brought a class action claiming the right to be paid $14 per hour, overtime, and vacation pay as an employee under

13 2020 SCC 16.

the Ontario *Employment Standards Act, 2000*.[14] All drivers enter into a standard form contract with Uber as independent contractors. The contract required that any disputes between Uber and its drivers be resolved by arbitration in the Netherlands, in accordance with the rules of the International Chamber of Commerce, a process involving upfront costs of $14,500 USD. Heller argued that the arbitration clause was not enforceable on the basis that it was unconscionable as it provided a costly unequal bargaining power between Uber and the drivers. The Supreme Court of Canada held in an 8-1 decision that the arbitration clause was unenforceable in Ontario, as it denied Heller access to justice, was contrary to public policy, and that Heller could pursue the complaint against Uber in Ontario courts.

FIGURE 9.2 Comparing Arbitration to Negotiation/Mediation and Litigation

NEGOTIATION/MEDIATION	ARBITRATION	LITIGATION
Process is less adversarial than arbitration.		Process is more adversarial than arbitration.
It encourages more communication between the parties than arbitration.		It encourages less communication between the parties than arbitration.
Lawyers have less involvement than in arbitration.		Lawyers have the same involvement as in arbitration.
As in arbitration, parties have control of confidentiality.		Unlike in arbitration, parties have no control of confidentiality.
Process is less expensive than arbitration.		Process is more expensive than arbitration.
Parties are more likely to cooperate in the future than in arbitration.		Parties are less likely to cooperate in the future than in arbitration.
Parties have more control over process than in arbitration.		Parties have less control over process than in arbitration.
Parties have less ability to access or discover evidence than in arbitration.		Parties have more ability to access or discover evidence than in arbitration.
Process is less formal than arbitration.		Process is more formal than arbitration.
It provides a better opportunity to maintain a future relationship than arbitration.		It provides much less opportunity to maintain a future relationship than arbitration.
It provides a higher likelihood the parties will be satisfied with the outcome.		It provides a lower likelihood the parties will be satisfied with the outcome.
The result or resolution to the dispute has the potential to be more creative than in arbitration.		The result or resolution to the dispute is less likely to be as creative as in arbitration.

Source: Adapted from Norman Pickell, "Comparison of Mediation, Arbitration, and Court," online: <https://web.archive.org/web/20191125102743/http://www.normanpickell.com/comadrmedct.htm>. Reprinted with permission.

14 2000, c 41.

RECURRING CASE STUDY

What Is Arbitration?

To briefly recap, the issue surrounding the damaged figure skates was resolved at mediation (see Recurring Case Study in Chapter 8). However, in order to demonstrate how arbitration could have been used to resolve this matter, an alternate outcome is presented below.

Alternate Outcome

After the unsuccessful attempts at negotiation (see Recurring Case Study in Chapters 5 and 6), Angela decided that she would commence a small claims court action. When she went to the court office, she was surprised to find out that it would be several months, or possibly even a year, before she could get a court date. She was not willing to wait that long.

Angela contacted her former paralegal and asked if there was anything else that she could do. The paralegal suggested hiring a private arbitrator and recommended one who he had used in the past because he has experience in assessing damages. He also indicated that he would be willing to represent Angela at the arbitration—pro bono—because he was considering expanding his paralegal practice to include ADR services and would like to be involved in an arbitration.

The paralegal then explained the pros and cons of arbitration, confirmed with his provincial law society that a paralegal would be permitted to provide representation, contacted Mary and Leo to see if they would be agreeable to arbitration, and booked the arbitrator for the upcoming week.

Discussion of Scenario

- *Arriving at Arbitration by Agreement*: Angela, Mary and Leo decided to opt into arbitration. It was not required by a contract or statute. Instead, the parties decided to pursue private arbitration instead of going through the court system.
- *Consulting Provincial Law Society*: In order to act as a representative in arbitration, Angela's paralegal consulted with his provincial law society (e.g., LSO) in order to ensure that such representation would fall within the paralegal scope of practice. It is advisable for paralegals to always seek such confirmation for arbitration matters.
- *Scheduling the Arbitration*: The parties can have an arbitration decision much more quickly than they could obtain a court verdict. Since Angela did not want to wait several months for the matter to be resolved, arbitration presented a more efficient option.
- *Selecting an Arbitrator*: Since there are no credential requirements to become an arbitrator, it is important to research potential arbitrators. Angela's paralegal was able to suggest an experienced arbitrator who he had worked with in the past.
- *Preparation for Arbitration*: Angela's paralegal took the time to explain the pros and cons of arbitration so that Angela could decide if it was the option that she wanted to pursue.

CHAPTER SUMMARY

Arbitration as a process is distinguished from that of negotiation and mediation in that it involves a neutral third party who hears evidence and makes a final and usually binding decision. Arbitrations are achieved either by statute or by contractual agreement as a means of circumventing the litigation process. Arbitrators are selected for a number of reasons, they may be experts in a particular subject, or they may have a reputation for fair decisions.

Ontario's *Arbitration Act* governs arbitrations by providing structure and fairness to arbitral proceedings and by ensuring that the judiciary will not unnecessarily interfere with the proceedings or outcome of an arbitration.

Not all arbitrations are conducted in the exact same way, but they are more formal than mediation or negotiations. This chapter explored the three distinct stages: before the hearing, at the hearing, and after the hearing.

An issue may be appropriate for arbitration when mediation and/or negotiation have failed to produce results but the parties are still interested in avoiding the costs of litigation, expediting the decision, or achieving a creative remedy. Arbitration may also be appropriate when variables relating to venue or to jurisdiction may complicate resolving a dispute.

KEY TERMS

ad hoc arbitration, **219**
arbitration, **216**
Arbitration Act, **219**
arbitration award, **216**
compulsory arbitration, **217**
consensual arbitration, **219**
High-Low or Bracketed Arbitration, **226**
Last Best Offer Arbitration, **226**
Non-Binding Arbitration , **226**
Scott v Avery clause, **219**

REVIEW QUESTIONS

1. When parties want an expert adjudicator to make a binding decision relating to their dispute, which of the following methods should they select?
   a. Negotiation
   b. Mediation
   c. Arbitration
   d. Litigation.
2. Which of the following statements best describes the benefits of arbitration as a method of dispute resolution?
   a. It allows the parties the freedom to arrive at their own resolution, it is cheaper than litigation, and it is confidential.
   b. It is cheaper than litigation, it is confidential, and it allows for a decision make with subject-matter expertise.
   c. Although it is more expensive than litigation, it allows for matters to be made public and provides the process with adjudicators that are more expert in the subject matter.
   d. It allows the parties to overrule the final and binding decision of the adjudicator if they are dissatisfied with the result.
3. What is an arbitration that is mandated by statute called?
   a. Ad hoc arbitration.
   b. *Scott v Avery* arbitration.
   c. Consensual arbitration.
   d. Compulsory arbitration.
4. Which of the following best describes a *Scott v Avery* clause?
   a. A provision in an agreement indicating that the parties intend to circumvent litigation.
   b. A contractual indication that the parties prefer to seek the court's initial review before proceeding to arbitration.
   c. A provision in an agreement that indicates that arbitration has been mandated by statute.
   d. A provision in a court decision that indicates the decision of the arbitrator is deemed to be unjust.
5. What are arbitration acts?
   a. They are laws created by a legislature indicating that arbitration procedures are legal only when pre-approved by the courts.
   b. They are statutes created in American jurisdictions that have yet to be enacted by any Canadian provincial legislature.
   c. They are laws created by a legislature indicating the main features of the proceedings and the limited role the courts play in reviewing them.
   d. The are publications listing the most recent decisions of arbitrators in the relevant jurisdiction.

SHORT ANSWER QUESTIONS

1. Name the methods that parties can use to circumvent litigation and arrive at arbitration.
2. What is an arbitration award and how is it enforced?
3. Name the benefits of arbitration over the process of litigation.
4. Under what circumstances might litigation be preferable to negotiation or mediation?
5. When drafting an arbitration clause to insert into a commercial agreement, what are the main elements that would need to be included?
6. Describe three types of arbitration Last Best Offer Arbitration, High-Low Arbitration, and Non-Binding Arbitration.

EXERCISE

1. Arbitration Role Play: Condominium Pet Dispute (see Appendix D)

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Appendix A ADR Institute of Canada Arbitration Rules—Table of Contents

To access the complete document (ADRIC Arbitration Rules), go to the ADR Institute of Canada website at <https://adric.ca/rules-codes/arbrules/>.

TABLE OF CONTENTS

Appendix B ADR Institute of Canada Code of Ethics

CODE OF ETHICS

This code is applicable to all members of the ADR Institute of Canada.

1. A Member shall uphold and abide by the Code of Ethics, the Code of Conduct for Mediators, the regulations, and other professional requirements adopted by the ADR Institute of Canada.
2. A Member shall not carry on any activity or conduct which could reasonably be considered as conduct unbecoming of a member of the ADR Institute of Canada.
3. A Member shall uphold the integrity and fairness of the arbitration and mediation processes.
4. A Member shall ensure that the parties involved in an arbitration or mediation are fairly informed and have an adequate understanding of the procedural aspects of the process and of their obligations to pay for services rendered.
5. A Member shall satisfy him/herself that he/she is qualified to undertake and complete an appointment in a professional manner.
6. A Member shall disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality or bias.
7. A Member, in communicating with the parties, shall avoid impropriety or the appearance of impropriety.
8. A Member shall conduct all proceedings fairly and diligently, exhibiting independence and impartiality.
9. A Member shall be faithful to the relationship of trust and confidentiality inherent in the office of arbitrator or mediator.
10. A Member shall conduct all proceedings related to the resolution of a dispute in accordance with applicable law.

Source: ADR Institute of Canada, "Code of Ethics," online: *ADR Institute of Canada* <http://adric.ca/rules-codes/code-of-ethics>

Appendix C Key Excerpts from the Arbitration Act, 1991

SO 1991, c 17

Definitions

1. In this Act,

"arbitration agreement" means an agreement by which two or more persons agree to submit to arbitration a dispute that has arisen or may arise between them;

...

Application of Act

Arbitrations conducted under agreements

2(1) This Act applies to an arbitration conducted under an arbitration agreement unless,

(a) the application of this Act is excluded by law; or

(b) the *International Commercial Arbitration Act* applies to the arbitration.

Arbitrations conducted under statutes

(3) This Act applies, with necessary modifications, to an arbitration conducted in accordance with another Act, unless that Act provides otherwise; however, in the event of conflict between this Act and the other Act or regulations made under the other Act, the other Act or the regulations prevail.

Contracting out

3. The parties to an arbitration agreement may agree, expressly or by implication, to vary or exclude any provision of this Act except the following:

1. In the case of an arbitration agreement other than a family arbitration agreement,
   i. subsection 5(4) ("*Scott v. Avery*" clauses),
   ii. section 19 (equality and fairness),
   iii. section 39 (extension of time limits),
   iv. section 46 (setting aside award),
   v. section 48 (declaration of invalidity of arbitration),
   vi. section 50 (enforcement of award).

...

Arbitration agreements

5(1) An arbitration agreement may be an independent agreement or part of another agreement.

...

Revocation

(5) An arbitration agreement may be revoked only in accordance with the ordinary rules of contract law.

...

Court intervention limited

6. No court shall intervene in matters governed by this Act, except for the following purposes, in accordance with this Act:

1. To assist the conducting of arbitrations.
2. To ensure that arbitrations are conducted in accordance with arbitration agreements.
3. To prevent unequal or unfair treatment of parties to arbitration agreements.
4. To enforce awards.

Stay

7(1) If a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding.

Exceptions

(2) However, the court may refuse to stay the proceeding in any of the following cases:

1. A party entered into the arbitration agreement while under a legal incapacity.
2. The arbitration agreement is invalid.
3. The subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law.
4. The motion was brought with undue delay.
5. The matter is a proper one for default or summary judgment.

...

Powers of court

8(1) The court's powers with respect to the detention, preservation and inspection of property, interim injunctions and the appointment of receivers are the same in arbitrations as in court actions.

Appendix C Continued

Questions of law

(2) The arbitral tribunal may determine any question of law that arises during the arbitration; the court may do so on the application of the arbitral tribunal, or on a party's application if the other parties or the arbitral tribunal consent.

Appeal

(3) The court's determination of a question of law may be appealed to the Court of Appeal, with leave.

...

Number of arbitrators

9. If the arbitration agreement does not specify the number of arbitrators who are to form the arbitral tribunal, it shall be composed of one arbitrator.

...

Duty of arbitrator

11(1) An arbitrator shall be independent of the parties and shall act impartially.

...

Rulings and objections re jurisdiction

Arbitral tribunal may rule on own jurisdiction

17(1) An arbitral tribunal may rule on its own jurisdiction to conduct the arbitration and may in that connection rule on objections with respect to the existence or validity of the arbitration agreement.

...

Equality and fairness

19(1) In an arbitration, the parties shall be treated equally and fairly.

Idem

(2) Each party shall be given an opportunity to present a case and to respond to the other parties' cases.

Procedure

20(1) The arbitral tribunal may determine the procedure to be followed in the arbitration, in accordance with this Act.

...

Evidence

21. Sections 14, 15 and 16 (protection of witnesses, evidence at hearings, notice of facts and opinions) of the *Statutory Powers Procedure Act* apply to the arbitration, with necessary modifications.

Time and place of arbitration

22(1) The arbitral tribunal shall determine the time, date and place of arbitration, taking into consideration the parties' convenience and the other circumstances of the case.

...

Enforcement by court

25(7) The court may enforce the direction of an arbitral tribunal as if it were a similar direction made by the court in an action.

Hearings and written proceedings

26(1) The arbitral tribunal may conduct the arbitration on the basis of documents or may hold hearings for the presentation of evidence and for oral argument; however, the tribunal shall hold a hearing if a party requests it.

...

Application of law and equity

31. An arbitral tribunal shall decide a dispute in accordance with law, including equity, and may order specific performance, injunctions and other equitable remedies.

...

Appeals

Appeal on question of law

45(1) If the arbitration agreement does not deal with appeals on questions of law, a party may appeal an award to the court on a question of law with leave, which the court shall grant only if it is satisfied that,

(a) the importance to the parties of the matters at stake in the arbitration justifies an appeal; and

(b) determination of the question of law at issue will significantly affect the rights of the parties.

Appendix D Role Play: Condominium Pet Arbitration

Participants: One or two arbitrators, two parties, two representatives

Level of Difficulty: Medium

Time: Set aside a minimum of 60 minutes to complete the preparation and conduct the arbitration

Objectives

- Develop advocacy skills in an arbitration
- Draft preparation sheets, opening statements, examination in chief and cross-examination questions, and closing statements
- Demonstrate how some disputes are better resolved through arbitration than litigation.

Preparation

- Divide the students into groups of five or six (if there are six students in a group, two students should co-arbitrate)
- Assign a role to each student
- Ask students to read their roles
- The legal representatives should complete the "ADR Worksheet for Arbitration (Paralegal)"
- The arbitrators should complete the "ADR Worksheet for Arbitration (Arbitrator)"

Note: This assignment would be best prepared in advance of the actual activity that day. For a quicker arbitration, students may complete only parts of the arbitration.

Debriefing with Students

1. Why is this an appropriate matter to go to arbitration?
2. How would your opening statement have differed if it had been prepared for a mediation?
3. What did you learn from this arbitration that will help you in your future practice as a legal representative?
4. Do you think this scenario will result in a win–win solution? Explain why or why not.

Condominium Pet Dispute

General Facts of the Case for Both Paralegals and the Arbitrator

The matter involves a resident, Claudia Benoit, and her husband Charles, who recently moved into their unit in June along with their much-loved Labrador retriever Jasper, even though the building has a no-pet policy. The condominium board has received many complaints from neighbours in the building about the dog. They approached the Benoits and asked them remove the dog or sell their unit and move out of the condominium. Claudia has refused, and claims that her real estate agent did not disclose to her that the building had a zero pet-policy. She further states that she suffers from a severe anxiety disorder and the dog is very important to the couple as the dog is therapeutic for her anxiety.

Claudia's claim is that her anxiety disorder is a disability. That has made the situation more complicated, as Claudia believes she should be able to keep Jasper based on her disability. The *Human Rights Code* prevents discrimination on the basis of disability. Therefore, if Claudia's anxiety is found as a disability under the Code, and she relies on the dog for therapy, then it is likely she would be able to keep Jasper regardless of the policy of the condominium.

All the residents have signed a condominium agreement that includes a *Scott v Avery* clause stating that in the event of a dispute between any of the condominium residents or the board, the parties agree to first attempt mediation, and if a settlement is not reached, to attend arbitration and the decision will be final and binding on the parties.

The parties attempted mediation; however, 15 minutes after the mediation started, Claudia left the mediation as she felt she was having a panic attack. Charles continued to attend on her behalf, however they were unable to resolve the matter. Medical experts have been consulted on two key issues: first, whether Claudia has a genuine disability as set out in the *Human Rights Code*; and second, whether the dog Jasper is a necessary therapy for Claudia's disability. Both of these issues must be satisfied for Claudia to keep the dog. If not, either the Benoits will have to remove Jasper from their unit or move out of the condominium building.

Condominium Pet Dispute

Role for the Condominium Board's Paralegal

You are a paralegal who has been retained to represent the board of a condominium corporation in an arbitration. You have met with your client and have hired some medical experts to provide evidence about

Appendix D Continued

Claudia's anxiety at the arbitration hearing. In preparation for the arbitration, draft the following:

1. Paralegal Preparation Worksheet
2. Opening statement for the condominium board
3. Examination in chief questions for the board
4. Examination in chief questions for the medical expert hired by the board
5. Cross-examination questions for the opposing party, Claudia
6. Cross-examination questions for the medical experts called by the opposing party
7. Closing statement on behalf of the condominium

Role for the Claudia Benoit's Paralegal

You are a paralegal who has been retained to represent a resident, Claudia Benoit, in an arbitration.

1. Paralegal Preparation Worksheet
2. Opening statement for Claudia
3. Examination in chief questions for Claudia
4. Examination in chief questions for the medical expert hired by Claudia
5. Cross-examination questions for the opposing party, the condominium board
6. Cross-examination questions for the medical experts called by the opposing party
7. Closing statement on behalf of Claudia

Role for the Arbitrators

You are an experienced arbitrator who specializes in condominium disputes. You will be presiding over an arbitration between the resident and condominium board.

Source: Adapted from J Cazzin, "Handling the Jerk Next Door," *Money Sense*, (28 December 2011), online. <https://www.moneysense.ca/spend/real-estate/the-jerk-next-door>.

ADR Worksheet for Arbitration
Condominium Pet Dispute: Paralegal

My Client's Position – What is my client seeking?

1. _____

My Client's Interests – Why is my client seeking what they are seeking? What they really care about (i.e., their wants, needs, concerns, hopes, and fears)

1. _____
2. _____
3. _____
4. _____

Opposing Party's Position – What do I think they are seeking?

1. _____

Opposing Party's Interests – Why are they seeking what they are seeking? What I think they really care about (i.e., their wants, concerns, hopes, and fears)

1. _____
2. _____
3. _____
4. _____

Arguments to Support My Client's Position – Key facts that should be summarized in the opening statement

1. _____
2. _____
3. _____
4. _____
5. _____

Evidence – Evidence that can be used at arbitration. *Be specific to the scenario.*

1. _____
2. _____

ADR Worksheet for Arbitration
Condominium Pet Dispute: Arbitrator

Position: Party A – What do I think they are seeking?

What is Party A's position? *Please identify who is Party A.*

1. _____

Position: Party B – What do I think they are seeking?

What is Party B's position? *Please identify who is Party B.*

1. _____

Interests: Party A – Why are they seeking what they are seeking? What I think they really care about (i.e., their wants, concerns, hopes, and fears).

What are Party A's interests?

1. _____
2. _____
3. _____
4. _____

Interests: Party B – Why are they seeking what they are seeking? What I think they really care about (i.e., their wants, concerns, hopes, and fears).

What are Party B's interests?

1. _____
2. _____
3. _____
4. _____

Speaking Sequence

Who will I ask to speak first? Why?

1. _____

_____

Appropriateness of Arbitration

Why will arbitration be an appropriate way to deal with this dispute?

1. _____

_____

Advocacy for Arbitration 10

Learning Outcomes

After reading this chapter, you will be able to:

- Develop an understanding of the needs of the main stakeholders in an arbitration.
- Learn to assess the viability of your client's position.
- Manage both oral and documentary evidence.
- Define your role as a legal representative in arbitration.
- Formulate the basis of legal arguments before an arbitrator.
- Apply the concepts from this chapter to a recurring conflict case scenario.

Introduction

In those circumstances when settlement seems unlikely and litigation unpalatable (or statutorily prohibited), it may be appropriate to attend an arbitration. There are a series of steps required to prepare to be an effective advocate in arbitration. From the inception of the arbitration, it is necessary to coordinate the selection of the arbitrator, collect the evidence upon which legal argument will be based, establish the procedural rules of the arbitration, and maintain a strong sense of each participant's role in the proceeding. Further, it is essential to continually re-evaluate the case and stay open to the continued prospects of settlement in the best interests of the client. This chapter will assist with the preparation for arbitration with these considerations in mind. As the chapter unfolds, it will become clear that, with some exceptions, many of the techniques for arbitration preparation match the techniques for litigation preparation.

Prior to Arbitration

Arbitrator Selection

One of the most significant decisions that is made prior to the arbitration process is the selection of the arbitrator. After all, it is this individual whom the parties entrust to determine the outcome of their dispute—an outcome that is final and usually binding. Having the confidence that the arbitrator is capable of making a reasoned, unbiased, and fair decision is important to the legal representatives and to the parties. For the decision to be respected and followed by the parties, it should be made by a competent and experienced arbitrator.

In some cases, there is a need for one individual arbitrator to be selected; in other cases, a panel of three arbitrators will be required to adjudicate the matter. The opposing representative and their client must also be comfortable with the arbitrator (or arbitrators) who has been selected. Consequently, the adjudicator selection in an arbitration should be taken seriously and not be performed casually.

There are different methods that may be used for arbitrator selection. Returning to the discussion about how parties arrive at arbitration, recall from Chapter 9 that arbitrations are either compelled by statute or by agreement (e.g., contract or on a consensual, ad hoc basis).

By Statute: In some circumstances, a statutorily constituted arbitration may pre-determine who will act as the arbitrator to adjudicate the dispute; in other circumstances it may not. It is dependent upon the nature of the statute and the administrative body that oversees the legislation.

By Agreement: If the parties have agreed to arbitration, the language of the *Scott v Avery* clause that constituted the arbitration may predetermine the individual who will adjudicate (e.g., by specifically naming the arbitrator or providing a roster of possible arbitrators), or it may not.

Alternatively, the language of the legislation or clause may outline a process for the parties to follow to select an arbitrator. Or, it may leave the determination open, allowing the parties to work together organically to arrive at finding an arbitrator upon whom they both agree. At times, coming to an agreement for one arbitrator can be more challenging than selecting a panel of three arbitrators. When the parties are required to select one arbitrator, there are often lengthy discussions and significant give and take before one is agreed upon. In other words, the prelude to an arbitration becomes, in itself, a negotiation. By contrast, when a panel of arbitrators needs to be selected, typically each side will select one arbitrator of their preference and then allow the two selected arbitrators to collaborate with each other in order to determine the third arbitrator who will act as the chair in the arbitration.

In order to select an arbitrator, it is important for legal representatives to consider the needs of their client and the perspectives of the various participants. Further, representatives should gain an appreciation of the nature of the dispute by contemplating the following questions:

- Is the matter steeped with complex process or legal doctrine?
- Does the dispute centre on issues that require a nuanced understanding of a certain industry?
- Is there a sense of immediacy that requires the arbitrator to be available on short notice?
- Is it going to be a prolonged arbitration that requires an arbitrator who has enough availability on their calendar?
- Does the prolonged nature of the arbitration add cost pressures on the client (i.e., affordability)?

The next step in selecting an arbitrator would be for the legal representatives to develop a list of arbitrators who may be appropriate for that particular dispute. In order to narrow down the list of potential arbitrators, consider a range of factors including, reputation, reported decisions, experience, fees, timing, and neutrality.

Reputation: Reach out to your network of colleagues. Knowing the reputations of potential arbitrators will greatly assist with the selection process.

Reported Decisions: To further strengthen knowledge of the roster of arbitrators, try to access any reported decisions that they have made in the past. Though many arbitrations go unreported (due to confidentiality requirements), there are some decisions that are reported as **arbitral jurisprudence**. An electronic search for decisions attributed to the specific arbitrators in question may reveal their perspective on the issues at hand. The record may also disclose whether the arbitrators have exposed a preference that appears to favour the client's point of view on the issues.

arbitral jurisprudence published written decisions from arbitrators outlining the reasoning for the outcome of other cases, which serve as a means of instructing decisions for future cases

Knowledge and Experience: A benefit of arbitration is that the adjudicator can be selected by the parties based on the arbitrators knowledge, expertise, and experience in a particular field. A client would benefit from an arbitrator who is experienced with the subject matter, the applicable law, the process of arbitration, and is adept at making reasoned decisions.

Fee Schedule: It is also advantageous to select arbitrators based on their projected costs for the arbitration and to select one who charges a reasonable fee (e.g., it is not uncommon for some arbitrators to charge $5,000 for each day of the arbitration).

Timing: It is important to consider how an arbitrator manages their calendar (e.g., availability and timeliness in releasing decisions after the arbitration). The extent of their availability can be instructive; some arbitrators post their calendars online. Too few appointments may mean that the arbitrator is inexperienced or unattractive to parties (e.g., due to their reputation). Too many appointments suggests that it would

be difficult to schedule the hearing dates in a timely manner and that there may be delay in obtaining the arbitrator's award.

Neutrality: Neutrality of the arbitrator is a feature that cannot be overemphasized. As an adjudicator, the parties must have full confidence that the decision-maker will be unbiased. If there are questions about a particular arbitrator in this regard, then the process and the outcome of the decision are at risk. Even if a there is a potential arbitrator who appears to have a preference in your client's favour, it is unlikely that the opposing party will agree to the selection of that individual.

Whoever the representative and their client may consider to be an ideal arbitrator will still need to be agreed to by the other party and their legal representative. As such, the arbitrator must be acceptable to both sides: someone who is unbiased with a potential to make a fair decision in either direction.

Once an arbitrator has been agreed upon, one of the two parties (or their representatives) will need to make a request of the arbitrator in order to retain their services. Retaining the services of that arbitrator need not be complicated. A simple letter sent to the arbitrator, with the other party copied, briefly describing the issue should suffice. An arbitrator who is certified by a professional body (e.g., ADR Institute of Canada) will have to adhere to a set of procedures and rules outlined by that professional body and this may include the manner in which they are retained.

Client Preparation

Having considered the perspective of the opposing party and the requirements for an appropriate arbitrator, it is now imperative to consider the needs of another key stakeholder in the arbitration process: your own client. For a legal professional, effective arbitration preparation and advocacy necessitates excellent client service.

It is important to have an intimate understanding of the facts and legal arguments relating to the case. This knowledge usually originates through discussions with the client. Legal professionals who are in a long-standing relationship with a client (e.g., a general retainer with an organization), may be able to acquire some of this knowledge over time. In other instances, the client will retain their representative shortly before the arbitration date. If this is the case, a thorough client interview will be necessary to properly understand and represent the client's interests. Regardless of how much notice has been provided, arbitration preparation will be best served by a formalized method of understanding the client's position, instructions, and assessment of the options they face.

To represent the best interests of the client, legal professionals must communicate clearly and continuously with their client in order to understand what is really important to the client. Legal representatives should develop an appreciation of their client's tolerances for all possible outcomes, in terms of risk and settlement options, long before the actual arbitration.

Obtaining Client's Instructions

To gain insight into the client's perspective, a recorded interview with the client should be conducted. At a stage early in the preparation for arbitration, representatives should sit down with their client and review the evidence (e.g., oral and documentary) and work together to develop a theory of the case by considering the strengths and weaknesses of both sides of the dispute. Doing so may help to reveal gaps in the case and trigger the need for further investigation (e.g., reaching out to additional witnesses).

It is in a legal representative's best interest, given professional responsibilities as a **fiduciary** of the client, to ensure that all relevant information has been gathered and that they have a clear understanding of the wishes of their client. Often, legal representatives who are in a comfortable relationship with a client opt to forgo any formalized process, believing they already have a clear assessment of their client's needs. However, this could lead to a situation where the legal representative and the client disagree over whether the representative acted within their scope of authority. This type of dispute can be minor and easily fixed, or it can escalate to something more significant which could potentially interfere with the successful outcome of a dispute, the integrity of the entire relationship, and the professional status of the representative (e.g., if a complaint is filed by the client). In order to prevent this type of situation from arising, legal representatives are strongly advised to keep a detailed record of the evidence for the case and their client's written instructions as to how to proceed. Failing to do so can have severe consequences if a discipline investigation is launched. This advice applies not only to preparing for an arbitration but also when entering into other forms of alternative dispute resolution (ADR) such as negotiation or mediation. It is only amplified for arbitration because the costs are higher and the consequences more long-reaching—given the risks and the binding nature of the outcome.

fiduciary
a representative who acts on behalf of another, has a duty of loyalty, and is legally obligated to make decisions in the best interests of the client

The representative should next proceed to take an inventory of the facts of the case—as perceived by the client. The ability to properly extract and digest this information can differ depending on the nature of the case, the personality and position of the client, and the level of emotions that are involved. For example, it is likely to be very different when collecting background information from a disputant in a highly personal matter who has just ended a long-term relationship with the other side than it is from a supplier who is trying to collect on damaged shipping containers. Legal representatives are well advised to take the emotional needs of the client into perspective while conducting the interview.

Gathering Evidence

Once instructions have been obtained, it is time to compile the evidence that will be needed to prove the theory of the case. Legal representatives should determine what will have to be proven in order to have persuasive arguments before the arbitrator. If there is an **agreed statement of facts** presented to the arbitrator at the outset of the arbitration, it will not be necessary to submit evidence to prove those particular facts. It is only necessary to lead evidence regarding the facts that are in dispute. Although the simplified nature of arbitration over litigation means that the rules of evidence are not as rigorous, it would be prudent to have a methodical understanding of how the evidence will be used because all evidence is likely to be scrutinized by the other party.

agreed statement of facts
a document jointly presented to the arbitrator by both parties outlining the evidence that is not in dispute, thereby accelerating the process by forgoing the need for witness testimony

Evidence comes in two main forms: oral testimony through witnesses and documentary evidence presented as exhibits. Because of the high variance in content and substance of arbitration cases, it is difficult to specifically itemize which evidence may be helpful in proving a case. It will vary from case to case. Keep in mind that, since some evidence may be in the sole possession of the opposing party, it may be appropriate to take the steps to obtain disclosure of such evidence in advance of the arbitration (e.g., the arbitrator may order the disclosure of specific items at a prehearing conference).

Figure 10.1 presents an example of different types of evidence for a simple dispute. By mapping it out in this manner, it organizes how each item will be used in the arbitration: the type of evidence, the facts that will be proven, and the means to get the evidence on the record.

FIGURE 10.1 Using Witness Testimony and Documentary Evidence to Prove Your Case

STEP ONE: Develop a simple statement of the facts of the case: Witness A (your client) entered into a contract with the opposing party (Witness C). Witness B was present during the discussions of the agreement. Witness A gave the opposing party a cheque and a bill of sale. Witness B verified that the cheque cleared the bank account. The opposing party's spouse (potentially Witness D), who was present at the exchange, indicates that there was hesitation about the nature of the agreement.

STEP TWO: Outline a simple statement of the law relating to the case, such as "The law of contract states that when two parties enter into an agreement, for it to be enforceable, there needs to be consideration, an exchange of value."

STEP THREE: Map out the evidence, preferably using a chart as below:

Source	Type of Evidence	Facts That Will Be Proven	Means to Be Introduced into Evidence
Witness A	Oral testimony	The two parties agreed to the transaction based on conduct and intended it to be binding.	Oral evidence, on direct examination
Copy of cancelled cheque	Exhibit	There was consideration, an exchange of value.	As an exhibit through Witness A
Bill of sale	Exhibit	The consideration is directly related to the exchange of goods and services in question.	As an exhibit through Witness A
Witness B	Oral testimony	The two parties agreed to the transaction based on conduct and intended it to be binding.	Oral evidence, on direct examination
Bank account statement	Exhibit	The opposing party accepted the payment and intended the agreement to be binding.	As an exhibit through Witness B
Witness C (opposing party)	Oral testimony	Despite this witness's direct testimony, it is discredited by showing that Witness A and Witness B have a differing and credible version of events and that Witness C's story is not credible.	Oral evidence, on cross-examination
Potentially Witness C as a witness for the opponent	Oral testimony	Despite this witness's direct testimony, it is discredited by showing that the witness was not paying attention to the transaction at the time.	Oral evidence, on cross-examination

STEP FOUR: In closing arguments, outline to the arbitrator that the evidence shows there was a binding contract in accordance with the law and that your client is entitled to the resulting monetary damages plus interest. Put forward legal jurisprudence to demonstrate the legal doctrine.

The example in Figure 10.1 revolves around a simple dispute about the existence of an enforceable contract. Even in such rudimentary circumstances, there are potentially four witnesses who will appear, under oath, before the arbitrator: two witnesses in favour of your version of the events (their evidence will be entered through direct examination) and two witnesses who do not support your version of events (you will attempt to discredit their evidence through cross-examination). To bolster the evidence, there are three pieces of documentation that will be used to prove the existence of the contract (these documents will be entered into evidence as exhibits—two of them will be entered during the testimony of Witness A, and one during the testimony of Witness B).

Using this example as a template, legal representatives can begin a similar process to prove their own case. Most cases will be more complex than the one provided in the example. However, it may helpful to use the same simplified approach to understand other cases, with the same basic statements of the facts and of the law. Overcomplicating a case brings the risk of losing sight of the true nature of the case, especially since an overarching goal of arbitration is speed and efficiency. When a case is overburdened with complexity, it will interfere with these goals—confusing all parties and the arbitrator. Consider the following steps to simplify the process:

- Review the interview notes from the discussions with the client and witnesses.
- Ask the client for all relevant documentation relating to the issue.
- Consider other witnesses that may be needed to reinforce the client's position or to introduce any documentary evidence that cannot be directly entered into evidence through the client.
- Identify any gaps that remain in proving the client's position and seek out further witnesses or documentary evidence to fill those gaps.

Formulating Strategies and Techniques

It is a legal representative's role, in concert with their client, to gain a solid grasp of the facts of the case and to determine the best means to achieve a favourable decision from the presiding arbitrator. It is also necessary to consider, within the confines of the law, alternative methods beyond arbitration that may lead to a favourable result (e.g., a negotiated or mediated settlement). As the case progresses and perhaps alters course, the client will have to be made aware of any developments and will need to provide further instructions in light of the changes. In formulating a strategy, legal representatives will have to consider procedural issues and how to best manage their opponent.

Procedural Issues in Advance of the Arbitration

One of the most attractive benefits of arbitration over litigation is the diminished level of formality, since the procedures before an arbitrator tend to be more relaxed. These relaxed procedures lead to a more streamlined, time-efficient, and cost-effective decision. Although the preferred mandate in arbitration is to promote an efficient hearing that is not bogged down by procedural quarrels, there are times when it will be necessary to raise preliminary matters and procedural arguments in order to advance the cause of the client.

The goal of arbitration is to provide the arbitrator with all the evidence and legal reasoning necessary to make a fair decision in resolution of the dispute. Accordingly, relaxing the procedural arguments throughout this process can help to achieve this desired goal. However, this formula is successful only if the opposing legal representative uses the same approach. If the opponent acts otherwise, and ties up the process with prolonged procedural arguments, many of the benefits of arbitration are lost. Failing to oppose these procedural manoeuvres from the other side, may expose a client to an unfair assessment of the case. Take this as a cautionary note to use balance in approaching the procedures of arbitration. Try to instill the principles of simplified process in your opponent and to promote these principles before the arbitrator. But be ready to oppose unnecessary interventions from legal representation if there is not a consensus on simplified procedures.

Procedure varies with the arbitrator. Each adjudicator will have a unique perspective on how the arbitration should proceed. This is especially true with an independent arbitrator who is not associated with a governing body that has pre-stated rules and procedures. To be able to acclimatize to the approach of the arbitrator, legal representatives must remain agile and able to adjust to their preferences. If further clarity is needed about the approach that an arbitrator will use for the hearing, it is advisable to request a **pre-hearing conference**. Items that can be discussed during the pre-hearing conference are of an administrative nature, including:

pre-hearing conference
a meeting held between both legal representatives before the arbitrator in advance of the hearing for the purpose of establishing administrative and procedural issues

- Does the arbitrator require pre-hearing briefs?
- How will documentary exhibits be entered and recorded into evidence?
- Can witnesses be presented out of sequence to accommodate their schedules?
- Would the arbitrator like to receive submissions of cases referred to in the legal argument?

Many arbitrators will turn to the legal representatives and ask for their input in responding to administrative or procedural questions. As such, it is wise to consult with the opposing legal representative and establish a consensus on how the arbitration should proceed from an administrative perspective.

Once the arbitrator's approach and preferences have been established, it is important to consider any initial issues that may arise at the outset of the hearing. Common procedural issues are listed in the text box below, "Typical Procedural Issues Raised at Arbitrations."

TYPICAL PROCEDURAL ISSUES RAISED AT ARBITRATIONS

- Arbitrator jurisdiction
- Access to hearing: open versus closed; witness exclusion
- Parties or interested persons failing to attend
- Standing of the parties
- Access to evidence: disclosure and summoning witnesses
- Order and timing of proceedings

Legal representatives should determine the extent to which the arbitrator has jurisdiction over the issue at hand. The scope of jurisdiction will depend on any applicable statutes or the contractual clause that created the arbitration. If there is a concern that the arbitrator may overreach that jurisdiction to the detriment of their client (e.g., the arbitrator may award damages or a penalty outside of their authority) the legal representative will want to determine the extent of the arbitrator's jurisdiction at the outset of the arbitration.

It is also advisable to establish early on who can be in attendance at arbitration. This can be in relation to restricting attendees and excluding or compelling witnesses.

Restricting attendees: Since having a confidential process is often one of the incentives to attend arbitration, restricting attendees at the hearing may be important to the parties.

Excluding witnesses: Excluding witnesses from the arbitration until they are called to testify will ensure that their evidence is not unduly influenced by the testimony of other witnesses.

Compelling witnesses: Legal representatives may also need the assistance of the arbitrator to compel a witness to attend. Under legislation, arbitrators can have the power to **summon** (or subpoena) witnesses in the same manner that a court can.

The Preparing for Arbitration Checklist in the text box below can be used to help prepare for an arbitration hearing. The checklist is broken down into different categories for preparation, namely narrative, people, evidence, procedures, and law.

summon
the power of an arbitrator to compel an individual to attend a hearing as a witness, the same power and consequences of a court; also known in some jurisdictions as a subpoena

PREPARING FOR ARBITRATION CHECKLIST

Narrative

- ☑ Theory of the case
- ☑ Opening statement
- ☑ Closing argument
- ☑ Agreed statement of facts is helpful (to focus the arbitration on what matters)

People

- ☑ List of witnesses and summary of evidence
- ☑ Non-leading questions for direct examination of own witnesses
- ☑ Leading questions for cross-examination of opposing witnesses
- ☑ Expert witnesses (if opinion evidence is required, an expert is crucial)
- ☑ Preparation of your witnesses
- ☑ Summonses issued by the arbitrator and served on witnesses (plus attendance and travel money)

Evidence

- ☑ Agreed book of documents
- ☑ Four or more copies of all documents to be relied on (i.e., copies for arbitrator, witness, each party)
- ☑ Any objects/items that may be needed to be at arbitration

- ☑ Familiarity with the technology at the hearing room
- ☑ Exhibit list (to be filled in at arbitration)

Procedures

- ☑ Review of specific rules applicable to the arbitration (take a copy to the arbitration)
- ☑ All documents served well in advance of arbitration
- ☑ Expert reports must be served with enough time prior to arbitration for the opposing expert to review and critique
- ☑ Notices of intention regarding expert reports and business records must be served in compliance with the *Evidence Act*[1] (unless the arbitration rules are relaxed)
- ☑ A request to admit can help prove facts and documents
- ☑ Study of the fundamentals of the rules of evidence
- ☑ A list of common objections (use objections sparingly)

Law

- ☑ Review the *Arbitration Act, 1991*,[2] or the *International Commercial Arbitration Act*[3]
- ☑ Preliminary issues, if any, to be brought at the outset of arbitration
- ☑ Elements of the cause(s) of action
- ☑ Calculation of damages
- ☑ Factum with relevant legislation and cases
- ☑ Copy of offers in sealed envelope
- ☑ Costs submissions

Source: Adapted from M Hassell, "Arbitration Checklist" (June 2015), online: <http://trialcounsel.ca>.

This checklist clearly demonstrates that a successfully argued arbitration hearing is a combination of narrative, evidence, procedures, and law. It starts with a well-defined theory of the case outlined in well-scripted opening and closing arguments. The hearing includes prepared questions asked of witnesses to elicit the evidence (or refute statements from opposing witnesses) and lists of necessary documentary evidence, all of which is to be exhibited before the arbitrator through the lens of the procedure and the law.

Opponent Management

More practically speaking, legal representatives in an arbitration need to incorporate in their strategy the considerations of the opposing party. While much of arbitration preparation mimics the preparations for litigation, this is one notable area where the approaches diverge. Since arbitration is often made possible by the joint agreement of the parties through contract, the two parties are inextricably reliant upon one another for the proceeding to be effective. Depending on the language that constitutes the arbitration, one party may rescind endorsement of the process and opt instead to proceed to more costly litigation. And even if the language (or statute) does not permit the party to rescind endorsement of arbitration, the party may challenge an aspect of the process using the courts and the *Arbitration Act*, thereby frustrating the initial purpose of arbitration (i.e., to avoid costly and time-consuming litigation in the courts). As such, it is worth noting that legal representatives can serve their clients best when they keep the lines of communications open with the opposing side.

When managing opponents, the parties are best advised to collaborate on questions of procedure. For instance, if the arbitration clause (or the governing statute) does not specify details about arbitrator selection, the parties must agree to jointly select the arbitrator. Also, the parties almost certainly will share a joint interest in keeping the procedure focused and efficient. To do so, both sides may agree that some of the evidence is not in dispute. Under these circumstances, they can agree to submit to the arbitrator an agreed statement of facts. Doing so could potentially reduce or eliminate the need for witness testimony, thereby significantly reducing the number of hours or days required for the arbitration. Other, more mundane issues could also be worked out amicably between the two parties, such as the arbitration's venue or scheduling.

Maintaining a cordial approach with the opposing side can have the benefit of increasing the prospects of settling the case under favourable terms, or if the relationship is ongoing between the parties, it could have the effect of avoiding future disputes. Regardless of whether these benefits are realized, a properly managed relationship between the parties helps focus the arbitration on matters of substance as opposed to process and will reduce costs and allow for a more durable arbitrator decision.

PRACTICE TIP

Tips to Manage the Relationship with the Opposing Party

In order to achieve a properly managed relationship with the opposing party, legal representatives should consider the following tips:

- Inform the other legal representative of procedural matters and preferences prior to the arbitration.
- Communicate information relating to evidence.
- Disclose documents and information early (anticipating that the other party will reciprocate).
- Make requests for disclosure early in the process.
- Give plenty of notice to the opposing party of any preliminary matters that will be brought before the arbitrator.
- Share your submissions with the opposing legal representative in advance of the arbitration session.
- Approach discussions with honesty, candour, and professionalism.

When facing a difficult opponent who is not acting collaboratively and does not reciprocate these behaviours, it may be necessary to confront that individual and/or adjust your actions accordingly.

1 RSO 1990, c E.23

2 SO 1991, c 17

3 SO 2017, c 2, Schedule 5

During the Arbitration

Role of the Participants

interested third party an individual, group, or legal entity (corporation)—such as a customer, supplier, or neighbour—that, though having no direct involvement in the dispute before the arbitrator, is somehow influenced by the outcome of the decision

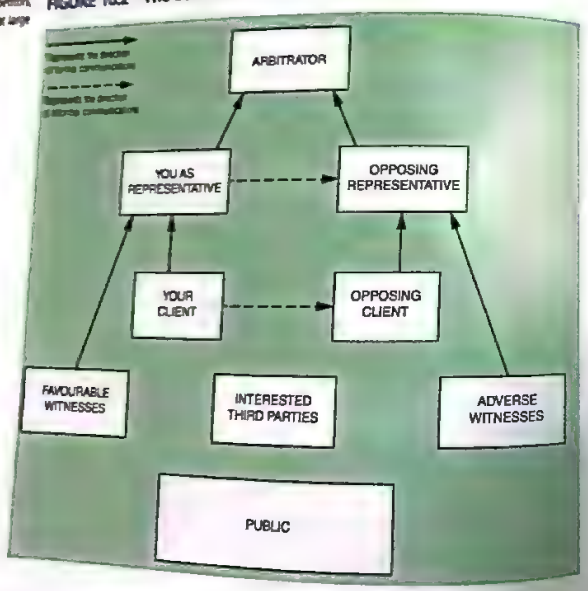
stakeholder a party that is somehow affected by an arbitration; may include the disputants, their legal representatives, the arbitrator, witnesses, shareholders of an organization, customers, taxpayers, competitors, and the public at large

In situations with a potential for conflict, it may seem natural that legal representatives be predisposed to immediately become entrenched in their client's position at the exclusion of considering the points of view of the other parties. This exclusionary approach may help to create strong advocacy and robust legal arguments; however, it may not serve the long-term interests of the client. After all, for there to be a functional arbitration, it necessarily must involve an opponent, an opposing legal representative, an arbitrator, and potentially other **interested third parties**. As a result, it is advisable to recognize the roles and the points of view of these other **stakeholders** in an arbitration. Figure 10.2 depicts the parties who may hold an interest in arbitration proceedings.

Paralegals

Paralegals must ensure that their regulatory body (e.g., Law Society of Ontario) allows them to act in the arbitration at hand. Some arbitrations are open to paralegal representation, some are not; indeed, some are ambiguous about the eligibility

FIGURE 10.2 The Stakeholders in an Arbitration



of a paralegal to act as a legal representative. For the sake of maintaining your licence to practise as a paralegal, it is important to verify whether it falls within the paralegal scope of practice (see "Who Can Act as a Representative in Arbitration?" in Chapter 9).

Paralegals may be able to act as the lead legal representative and employ all of the skills discussed in this book. However, even if representation at arbitration is restricted to lawyers, there still may be a role for a paralegal in the arbitration. The lawyer would act as lead, and the paralegal could act as "second chair."

Having a knowledgeable paralegal in attendance to assist by taking notes is invaluable. There is no stenographer in an arbitration to record the proceedings. Yet, the lawyer will need a written record of what has taken place during the arbitration, and they are often unable to take proper notes during the process. It will also be useful for the paralegal to observe witness testimony, read body language, and recognize other cues that may assist the lawyer in choosing methods of eliciting the best evidence.

Prior to the arbitration, paralegals can assist in preparing witnesses, compiling exhibits, locating evidence, sourcing legal doctrine, and formulating the theory of the case under the guidance and supervision of the leading lawyer.

Clients

The best advocacy allows for the client to be front and centre in the process. If the client is able to understand the parameters of the law, they will be an important resource in the execution of the proceedings. However, some clients may be impeded by the emotions of the case and unable to focus on rational outcomes. This is where the legal representative is required to step in and give the client proper perspective and the objectivity necessary to make decisions to achieve the best results. Not every client will have the same aptitude for legal procedures, so their level of participation will have to be assessed on a case-by-case basis. Remember that the client is the decision-maker and legal representatives are entrusted to protect their best interests.

Stakeholders

As was shown in Figure 10.2, there may be other interested third parties (e.g., a supplier, business partner, shareholder, insurer, spouse, or litigant) in a parallel proceeding who would be considered a stakeholder. Furthermore, witnesses from either side of the dispute may also be considered as stakeholders if they hold an interest in the outcome of the arbitration. Even if they do not hold a vested interest in the outcome, as witnesses they have an interest in the proceeding itself given their necessary involvement.

Expanding the scope of stakeholders even further, the public may have an interest in the outcome of an arbitration. In a very generic sense, the public is certainly interested in arbitration proceedings delivering justice to the participants so that the rule of law is preserved. But the public's interest in a specific arbitration may also be present, depending on the subject matter. While this issue of the public's interest may seem academic, it actually raises practical questions about whether an arbitration should be permitted to exclude attendees and whether the decision should be kept confidential.

Evidence

Recall that evidence includes oral testimony of witnesses and documentary evidence presented as exhibits. The goal of arbitration is to furnish the arbitrator with all of the necessary evidence and to provide an interpretation of the law that persuades that arbitrator to decide the case in your client's favour. Entering evidence is a key component of this process. It should be done in the spirit of efficiency in order to save costs, but also to promote clarity in the mind of the arbitrator. Often the most compelling theory of a case is the one that is simple in nature and easy to follow. Essentially, presenting a case involves connecting the dots for the adjudicator. This is accomplished with credible witness testimony and supporting documentary evidence.

It may be that much of the evidence is not in dispute between the parties. If that is the case, both sides can agree on the evidence and present it in an agreed statement of facts. Agreeing on these undisputed facts and submitting them in writing to the arbitrator will greatly reduce the length and cost of the proceedings by forgoing the need for witness testimony. In the absence of an agreed statement, some arbitrators will request the submission of a **pre-hearing brief**, a document outlining the theory of the case (it is analogous to a court's statement of claim or plaintiff's claim). The utility of such a briefing will depend upon the variables of each arbitration (e.g., the complexity of the facts and the legal arguments). Legal representatives may want to guard against the other party submitting an unsolicited pre-hearing brief because there needs to be balance and agreement between the parties in terms of access to the arbitrator. If there is imbalance with exposure to the arbitrator, it can taint the neutrality of that arbitrator. Be sure to act in concert with the other party when communicating with the arbitrator by copying all correspondence with the arbitrator to the opponent and also ensure that the opposing party does the same.

pre-hearing brief
a document outlining your version of the theory of the case, analogous to a court's statement of claim

The arbitrator will impress upon the parties the methods in which evidence is received, the order of witnesses, the extent to which those witnesses are examined, and how documents are added to the record. Recall that the goal is to provide the arbitrator with the information necessary to gain an understanding of the facts and legal arguments.

It is highly unlikely that a stenographer will be present at arbitration. As a result, arbitrators will need to have their own method of keeping track of the evidence. They may electronically record the proceedings, but they usually do not do so. Instead, they will typically create a record of testimony by typing their notes on a device (e.g., laptop computer), or perhaps even handwriting their notes. Arbitrators will need to have a complete record of all of the evidence in order to demonstrate that they have considered everything before making a final and binding decision. Keeping in mind that arbitrators will require time to make notes, it is important that for advocates to properly pace their submissions and witness examinations, making sure the arbitrator has enough time to prepare a proper record of the proceedings. This almost certainly means that testimony needs to be at a pace considerably slower than normal conversation. Allow for pauses in the discussion so that the arbitrator can keep up and not become frustrated with the delivery of the evidence.

Examining and Cross-Examining Witnesses

Oral evidence delivered by witnesses is one of the forms in which evidence is presented in an arbitration hearing. This is a crucial method for providing the arbitrator with the information needed to make a reasoned decision about the dispute at hand. It is important to bring out the required information from the witnesses in a way that highlights the key points and emphasizes the credibility of that information.

A witness who has information that is helpful to your case can be called to testify. The legal representative who calls the witness will have the opportunity to conduct **direct examination** by asking questions to the witness and attempting to establish the witness's credibility. This is followed by an opportunity for the opposing party conduct a **cross-examination** of each witness. During cross examination, representatives will attempt to diminish the credibility of the opponent's witness testimony.

A witness who has information that is helpful to the opponent's case can be called by the other side for testimony. Such witnesses will be first directly examined by the other side and then by you under cross-examination. If a witness's testimony delivers information that requires clarification during cross-examination, the party who engaged in the direct examination will be granted a short opportunity to ask questions relating to the specific information that arose during the cross-examination; this is known as **rebuttal** (also referred to as re-examination).

A distinction that needs to be made is that, during direct examination and rebuttal, representatives are prohibited from asking leading questions (e.g., questions that are suggestive of an answer and questions that assume a fact that has yet to be established). During cross-examination, however, leading questions are permitted. Questions should revolve around witnesses' recollection of events or relate to documentary evidence with which they have had direct involvement. Usually in direct and rebuttal examination, legal representatives attempt to enhance the credibility of their own witness's testimony and in cross-examination, and are attempting to diminish the credibility of their opponent's witness's testimony.

direct examination
the process of asking questions of witnesses, under oath, whom you brought forward to elicit evidence that is helpful to your case

cross-examination
the process of asking questions of witnesses, under oath, brought forward by the opposing side, to refute or challenge evidence that is unhelpful to your case

rebuttal
the opportunity to clarify information that arose during cross-examination (also known as re-examination)

PRACTICE TIP

Having a checklist of the information that you intend to get on the record applies to all three stages of testimony (direct, cross, rebuttal) and will assist you in your goals. To achieve your goal of presenting credible evidence, you need to lay the groundwork: first, the background and credibility of the witness, and second, the witness's ability to discern the events that occurred. It may be helpful to refer back to the chart in Figure 10.2 in order to create a witness checklist and organize the information that you will need to prove your case.

Whether the questioning of the witness is during direct examination, cross-examination, or rebuttal, there are certain themes that apply to all of these stages. For instance, being courteous to a witness, having a generally agreeable demeanour, and showing a genuine desire to elicit information that is helpful to the arbitrator in order to arrive at the proper disposition of the case are at the heart of all good advocacy.

Also remember to keep the questions clear and simple and to avoid repetition that would waste the adjudicator's time.

Examining witnesses is tricky business and requires skill and experience. Being a witness is also a challenge. This explains why legal representatives expend considerable time and effort getting their witnesses to answer their questions, preparing them to deliver testimony that is clear and focused, and helping them to anticipate difficult questions and keep their composure during cross-examination. A helpful guide for questioning witnesses is provided in the text box below, "Tips for Conducting the Examination of Witnesses."

TIPS FOR CONDUCTING THE EXAMINATION OF WITNESSES

Consider the tips in this list as a guide for questioning witnesses.

1. *Establish credibility of the witness.* Each direct examination should be commenced by establishing the credibility of the witness. Ask a series of questions that will provide background information on the witness and how their testimony will be relevant. These preliminary questions will serve as a warm-up that will allow the witness to feel comfortable for the remainder of their testimony.
2. *Phrase questions appropriately.* Questions should be short, simple, and to the point. Witnesses will be nervous at the arbitration and it is advisable to avoid any unnecessary confusion with extra verbiage or complicated legal terminology. Remember that leading questions cannot be used during direct examination—using them can undermine the impact of the evidence and suggests that a witness who needs to be led has not been properly prepared.
3. *Avoid repetition.* Arbitrators will want their hearings to run smoothly and efficiently. Key evidence can be reiterated, but unnecessary repetition should be avoided because it can be seen as wasting the arbitrator's valuable time.
4. *Establish the case.* Since arbitrators will be hearing the evidence for the first time, it is necessary to establish the case by building the evidence from the ground up. Lay the evidentiary groundwork that will be necessary for the arbitrator to understand the witness's evidence.
5. *Deal with inaccurate testimony.* There are times when a witness has given earlier testimony that is incorrect or contradictory. Ignoring it leaves some uncertainty about the correct testimony, reduces a witness's credibility and leaves the statement vulnerable to cross examination. Instead, it may be better to confront inaccurate testimony by allowing the witness to have an opportunity to clarify which statement was incorrect and why.
6. *Show interest and respect.* Attempt not to be obtrusive but to display a genuine interest in the witness's evidence. Even when dealing with a difficult witness, it is unhelpful and improper to display discomfort with the witness.
7. *Listen carefully without interruption.* It is important to listen to each witness's testimony without interrupting. Witnesses should be able to completely finish an answer before the next question is asked. As well, listen carefully to ensure the witness has thoroughly responded to the original question and stated everything that was expected to be stated. If not, follow up with another question that may prompt the witness to fill in any blanks.
8. *Follow the arbitrator's cues.* If the arbitrator appears to be furiously making a note or is in the process of reviewing a document, it may be necessary to slow down or pause for a moment. If the arbitrator looks confused, ask if they would like further clarification or to have something repeated. It can be difficult to balance the needs of the witness and the arbitrator, but following the arbitrator's cues (e.g., facial expressions, inquiries) will provide some indication of what is needed.
9. *Follow your checklist.* Do not finish with a witness until all aspects of the checklist have been covered. It is a good idea to follow along and mark each item off once it is addressed.

Argument in Chief

Once all the witnesses have been examined and all of the evidence has been entered into the record, the parties will have an opportunity to provide their oral arguments. The party who initiated the complaint against the other side will likely be asked to make their summary argument first. This is called the **argument in chief**.

argument in chief a summary argument made by the party who initiated the complaint

The argument in chief ought to be a complete catalogue of the theory of the case, and how it connects to the evidence that was presented. It should also include an anticipation of the arguments of the opposing party in a way that pre-empts them. Consider a flow chart that connects the dots of logic through the case in a manner that helps the arbitrator to decide in your favour. Included in the argument would be a review of the evidence and an application of the relevant case law or statutes. An arbitrator may request a written submission of arguments or the cases and statutes that were relied upon. Arguments can only be made using facts that have already been presented in evidence. If there is a conflict in the evidence that was presented, it may be necessary to put forth reasons why your version of the evidence should be accepted over the evidence from the other side.

Next, the party who is responding to the complaint initiated by the other side will be able to present their arguments, known as **argument in rebuttal**. This will involve a reply to the argument in chief that addresses any new concept that came up from the other party. Rebuttals must be focused and short, and are an opportunity to provide their own theory of the case with an explanation as to how it connects to the evidence. Finally, the party who presented argument in chief will be able to offer their final commentary, known as **argument in reply**.

argument in rebuttal a short period following cross-examination that allows the party to pose specific questions to a witness about information that arose during the cross-examination that requires clarification

argument in reply final commentary made by the person who initiated the complaint

Assessing the Strengths and Weaknesses of the Case

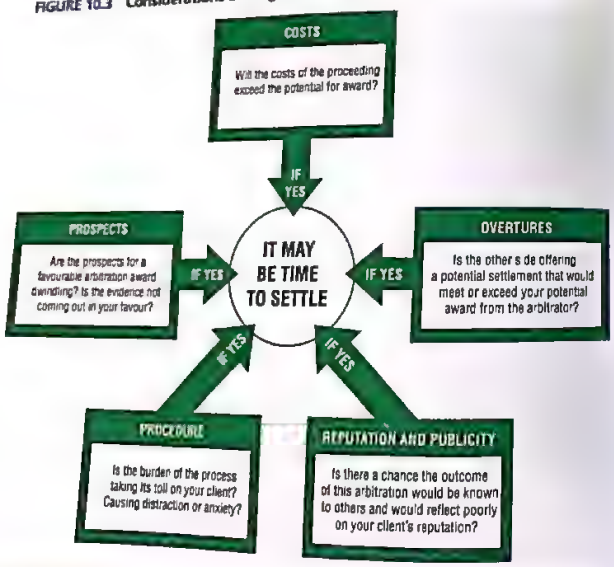
It has been suggested that the strategy and techniques need to be flexible enough to adapt to the changing nature of the evidence as it comes out during the arbitration.

Not all of the witnesses who give testimony will be helpful to your case, whether due to their nervousness or to a skillful cross-examination by the opposing side. Opposing witnesses may deliver testimony in a manner that is much more damaging than had been anticipated. These types of developments may force a re-evaluation and prompt consideration of settlement options.

On the same note, the opposing party may also need to re-evaluate in the face of challenges that arise. They may opt to offer an attractive settlement. Rather than bring too committed to seeing the arbitration to its end, it is advisable to entertain any settlement offer that meets the best interests of the client. There is no certainty that the decision will be in your favour. Nor is there certainty that even if an arbitration is found in your favour, the award will be to your liking. Settlement provides a degree of certainty and closure for the parties involved. As such, it is wise to continually assess whether it is time to settle.

Figure 10.3 depicts what to consider while moving through the arbitration process, highlighting the areas of costs, prospects, reputation and publicity, procedure, and overtures.

FIGURE 10.3 Considerations During the Arbitration Process—Time to Settle?



Integrative Case Study

Arbitration Advocacy

To briefly recap, the issue surrounding the damaged figure skates was resolved at mediation (see Recurring Case Study in Chapter 8). However, in order to demonstrate how arbitration could have been used to resolve this matter, the alternate outcome from Chapter 9 is continued below.

Alternate Outcome

Prior to arbitration, the arbitrator worked with the parties to establish agreeable rules and procedures for the session. At arbitration, both sides presented their evidence and the arbitrator ultimately held Mary and Leo liable for all of the damages. The arbitrator awarded Angela $1,000. Angela was happy with the outcome even though she would have to pay $400 for her share of the arbitrator's fee. Unfortunately, this outcome created some additional tension between the parties because Mary and Leo were upset with the arbitrator's award. As a result, Angela thought it would be best to find a new place to live for the next school year and the parties agreed to terminate her lease.

Discussion of Scenario

- *Procedural Issues* A benefit of arbitration is that the parties can work with the arbitrator to establish appropriate rules and procedures, as was done with the parties in this scenario.
- *Win–Lose Outcome:* Although arbitration is considered to be a form of ADR, the process is typically structured in a way that one party will win and one party will lose. Mary and Leo were not happy with the outcome because the arbitration held them liable for the damages.
- *Cost of Arbitration* The cost of arbitration is shared by the parties. Although Ange a was awarded $1,000, she would still have to pay $400 towards the arbitrator's fees.
- *Relationship Between the Parties* In some cases, arbitration allows the parties to maintain their relationship (e.g., labour relations); however, there is the possibility that the outcome will put a strain on the relationship between the parties. Unfortunately, in this scenario, the relationship between the parties deteriorated after participating in arbitration.

CHAPTER SUMMARY

This chapter has explored the process of arbitration, providing an overview of the preliminary matters that require attention, including selecting the arbitrator and obtaining instructions from the client. The chapter highlighted that the arbitration itself requires a strong grasp of the theory of the case and the evidence, both oral and documentary, to support that theory. Persuasive advocacy and a continuous appreciation of the strength of arguments can assist in getting a favourable decision from the adjudicator or recognizing when it would be appropriate to settle.

Many of the techniques for arbitration preparation match the techniques for litigation preparation. Every arbitration will have its own unique characteristics by virtue of the nature of the dispute, the area of law that is at the core of the dispute, the constitution of the arbitration, and the arbitrator who has been selected. Despite these variables, the main principles outlined in this chapter will assist in achieving the best results for the client.

KEY TERMS

agreed statement of facts, **245**
arbitral jurisprudence, **243**
argument in chief, **257**
argument in rebuttal, **257**
argument in reply, **257**
cross-examination, **255**
direct examination, **255**
fiduciary, **245**
interested third party, **252**
pre-hearing brief, **254**
pre-hearing conference, **248**
rebuttal, **255**
stakeholder, **252**
summon, **249**

REVIEW QUESTIONS

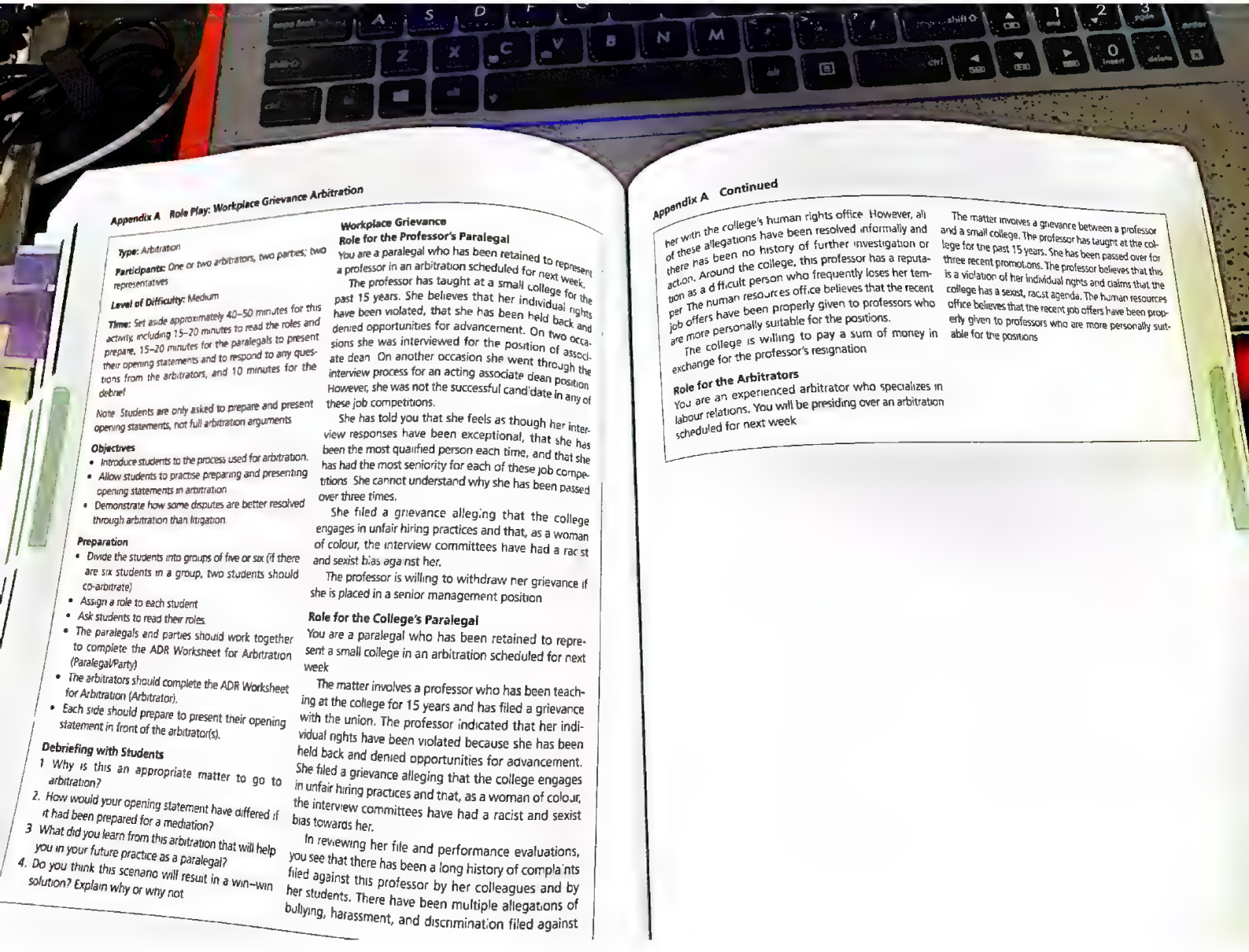
1. In an arbitration, which of the following may be considered an interested third party?
   a. Supplier.
   b. Shareholder.
   c. Insurer.
   d. All are considered interested parties.
2. Who typically covers the fees of an arbitrator?
   a. The party who requests the arbitration.
   b. The party who loses the arbitration.
   c. The administrating body of the *Arbitration Act*.
   d. Both parties share the costs of the arbitrator.
3. At what point during witness testimony is a party permitted to ask rebuttal questions?
   a. Immediately after the direct examination
   b. Just prior to the cross-examination
   c. After the cross-examination.
   d. At any point during the witness's testimony
4. Which is a TRUE statement about an agreed statement of facts?
   a. It is always a requirement before the arbitration can proceed.
   b. It is compiled by the parties at the end of the arbitration.
   c. It may be requested by the arbitrator.
   d. It must be filed in duplicate at the local courthouse.
5. Which of the following conditions would suggest the parties should consider settlement?
   a. When the costs of the proceedings appear to be exceeding the potential for award.
   b. When the client finds the process burdensome and stressful.
   c. When the other side is offering a settlement that would exceed the award an arbitrator would likely provide.
   d. All of these reasons suggest the parties should consider settlement.

SHORT ANSWER QUESTIONS

1. When evaluating the progress of an arbitration, under what circumstances might it be considered time to settle?
2. Name five considerations to take into account when selecting an appropriate arbitrator.
3. What traits of an arbitrator would the parties value the most when making their selection for an adjudicator?
4. Discuss the methods by which evidence gets before the arbitrator.
5. Identify typical procedural issues that are raised at arbitration.
6. Describe the nature of a legal representative's obligation to their client in arbitration.

EXERCISE

1. Arbitration Role Play: Workplace Grievance (see Appendix A)



Appendix A Role Play: Workplace Grievance Arbitration

Type: Arbitration

Participants: One or two arbitrators, two parties; two representatives

Level of Difficulty: Medium

Time: Set aside approximately 40–50 minutes for this activity, including 15–20 minutes to read the roles and prepare, 15–20 minutes for the paralegals to present their opening statements and to respond to any questions from the arbitrators, and 10 minutes for the debrief

Note: Students are only asked to prepare and present opening statements, not full arbitration arguments

Objectives

- Introduce students to the process used for arbitration.
- Allow students to practise preparing and presenting opening statements in arbitration.
- Demonstrate how some disputes are better resolved through arbitration than litigation.

Preparation

- Divide the students into groups of five or six (if there are six students in a group, two students should co-arbitrate).
- Assign a role to each student.
- Ask students to read their roles.
- The paralegals and parties should work together to complete the ADR Worksheet for Arbitration (Paralegal/Party).
- The arbitrators should complete the ADR Worksheet for Arbitration (Arbitrator).
- Each side should prepare to present their opening statement in front of the arbitrator(s).

Debriefing with Students

1. Why is this an appropriate matter to go to arbitration?
2. How would your opening statement have differed if it had been prepared for a mediation?
3. What did you learn from this arbitration that will help you in your future practice as a paralegal?
4. Do you think this scenario will result in a win–win solution? Explain why or why not.

Workplace Grievance

Role for the Professor's Paralegal

You are a paralegal who has been retained to represent a professor in an arbitration scheduled for next week.

The professor has taught at a small college for the past 15 years. She believes that her individual rights have been violated, that she has been held back and denied opportunities for advancement. On two occasions she was interviewed for the position of associate dean. On another occasion she went through the interview process for an acting associate dean position. However, she was not the successful candidate in any of these job competitions.

She has told you that she feels as though her interview responses have been exceptional, that she has been the most qualified person each time, and that she has had the most seniority for each of these job competitions. She cannot understand why she has been passed over three times.

She filed a grievance alleging that the college engages in unfair hiring practices and that, as a woman of colour, the interview committees have had a racist and sexist bias against her.

The professor is willing to withdraw her grievance if she is placed in a senior management position.

Role for the College's Paralegal

You are a paralegal who has been retained to represent a small college in an arbitration scheduled for next week.

The matter involves a professor who has been teaching at the college for 15 years and has filed a grievance with the union. The professor indicated that her individual rights have been violated because she has been held back and denied opportunities for advancement. She filed a grievance alleging that the college engages in unfair hiring practices and that, as a woman of colour, the interview committees have had a racist and sexist bias towards her.

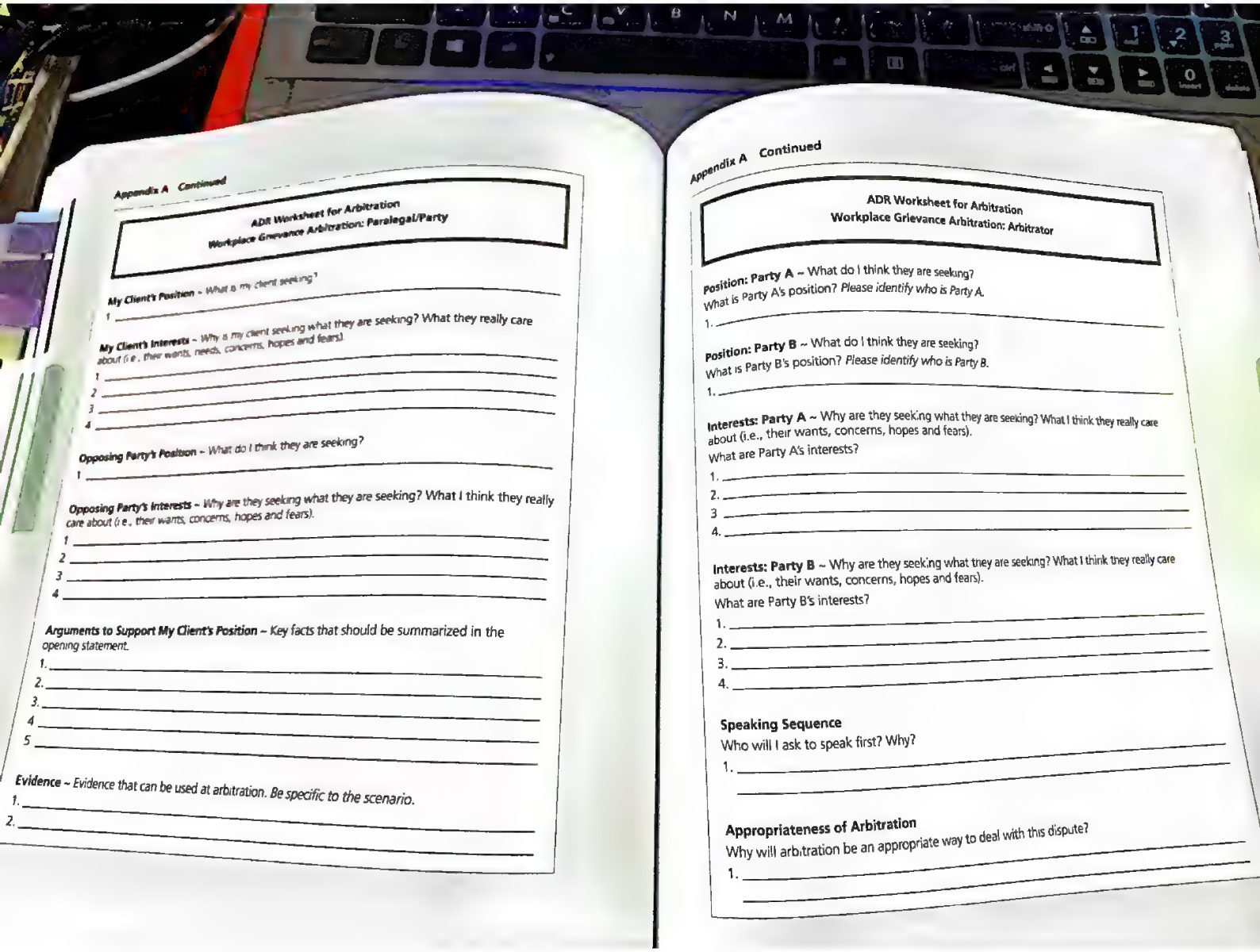
In reviewing her file and performance evaluations, you see that there has been a long history of complaints filed against this professor by her colleagues and by her students. There have been multiple allegations of bullying, harassment, and discrimination filed against her with the college's human rights office. However, all of these allegations have been resolved informally and there has been no history of further investigation or action. Around the college, this professor has a reputation as a difficult person who frequently loses her temper. The human resources office believes that the recent job offers have been properly given to professors who are more personally suitable for the positions.

The college is willing to pay a sum of money in exchange for the professor's resignation.

Role for the Arbitrators

You are an experienced arbitrator who specializes in labour relations. You will be presiding over an arbitration scheduled for next week.

The matter involves a grievance between a professor and a small college. The professor has taught at the college for the past 15 years. She has been passed over for three recent promotions. The professor believes that this is a violation of her individual rights and claims that the college has a sexist, racist agenda. The human resources office believes that the recent job offers have been properly given to professors who are more personally suitable for the positions.



Appendix A Continued

ADR Worksheet for Arbitration
Workplace Grievance Arbitration: Paralegal/Party

My Client's Position – *What is my client seeking?*
1. _____

My Client's Interests – *Why is my client seeking what they are seeking? What they really care about (i.e., their wants, needs, concerns, hopes and fears).*
1. _____
2. _____
3. _____
4. _____

Opposing Party's Position – *What do I think they are seeking?*
1. _____

Opposing Party's Interests – *Why are they seeking what they are seeking? What I think they really care about (i.e., their wants, concerns, hopes and fears).*
1. _____
2. _____
3. _____
4. _____

Arguments to Support My Client's Position – *Key facts that should be summarized in the opening statement.*
1. _____
2. _____
3. _____
4. _____
5. _____

Evidence – *Evidence that can be used at arbitration. Be specific to the scenario.*
1. _____
2. _____

Appendix A Continued

ADR Worksheet for Arbitration
Workplace Grievance Arbitration: Arbitrator

Position: Party A – What do I think they are seeking?
What is Party A's position? *Please identify who is Party A.*
1. _____

Position: Party B – What do I think they are seeking?
What is Party B's position? *Please identify who is Party B.*
1. _____

Interests: Party A – Why are they seeking what they are seeking? What I think they really care about (i.e., their wants, concerns, hopes and fears).
What are Party A's interests?
1. _____
2. _____
3. _____
4. _____

Interests: Party B – Why are they seeking what they are seeking? What I think they really care about (i.e., their wants, concerns, hopes and fears).
What are Party B's interests?
1. _____
2. _____
3. _____
4. _____

Speaking Sequence
Who will I ask to speak first? Why?
1. _____

Appropriateness of Arbitration
Why will arbitration be an appropriate way to deal with this dispute?
1. _____

Selecting the Right ADR Process

11

Learning Outcomes

After reading this chapter, you will be able to:

- Distinguish between the different types of ADR.
- Compare the ADR process with litigation.
- Assess which ADR process best suits the client.
- Minimize the potential risks associated with the legal representative–client relationship.
- Recognize the importance of preparation and rehearsal as part of the ADR process.
- Be clear about what role you will play in ADR.
- Recognize the ethical considerations in ADR.
- Understand the impact of gender and culture in ADR.
- Apply the concepts from this chapter to a recurring conflict case scenario.

Introduction

The majority of legal matters are settled by some form of alternative dispute resolution (ADR). Which ADR method to apply must be given careful consideration by the client and their legal representative. The most common forms of ADR include negotiation, mediation, and arbitration. Which ADR intervention is suitable will depend on the particulars of that unique legal action. In some cases, several methods may be used prior to a proceeding going to trial or even proceeding to another stage of ADR. For example, some matters may be subject to mandatory mediation even if the intention is to proceed to trial. In another example, some union and employer contract disputes may require a form of negotiation, then mediation, and finally arbitration as part of a resolution continuum that is set out in their employment contracts in the event a dispute arises. Below is a brief summary of the main forms of ADR discussed in earlier chapters.

Negotiation

Negotiation is a method of ADR wherein two or more parties communicate either directly or through representatives in order to reach an agreement on an action to be taken or to resolve a dispute. This process does not have the assistance of a neutral third party. Negotiation is a confidential process to try to settle a dispute. Any settlement discussions are subject to **settlement privilege** and therefore may not be discussed at trial. Settlement privilege applies to most civil legal actions in which parties communicate with the purpose of negotiating a resolution to a legal dispute. Through negotiation, the parties control both the process and possible outcome by negotiating a solution that may not be possible at trial. (See Chapter 5, "What Is Negotiation?" for more information.)

settlement privilege *communication made with the purpose of negotiating a resolution of a legal dispute and that may not be disclosed at trial*

Mediation

Mediation is an ADR process that allows an unbiased third party to facilitate a negotiation between the parties either directly or with representatives. The mediator is not an adjudicator and does not impose a binding decision on the parties. Instead, the mediator assists the parties to reach a settlement based on their own terms. The mediator may also help the parties to narrow down issues, brainstorm options, prioritize, and develop settlement agreements. Like negotiation, mediation is confidential and includes discussions about settlement; therefore, it is similarly subject to settlement privilege. In some cases, mediation may be mandated by legislation within a particular court or tribunal process. The parties may select the mediator or have one assigned. In other private situations, mediation is a voluntary process. Parties may choose to participate, and may select their mediator. (See Chapter 7, "What Is Mediation?" for more information.)

Arbitration

Arbitration is a dispute resolution process that most closely resembles a trial. It is an adjudicative process during which an unbiased third person acts as an adjudicator between the parties and [illegible] assessing both sides of the dispute. It is often referred to as a "private trial" because the process takes place outside of the court system. The process is usually confidential and not accessible to the public. Any documents are confidential, and the hearing is not open to the public. The parties follow rules of procedure specific to arbitrations in preparation for and during the hearing. The parties present evidence and make legal arguments, and the process results in a final and usually binding decision made by the arbitrator. (See Chapter 9, "What Is Arbitration?" for more information.)

Comparing ADR to Litigation

The table below briefly highlights the differences between the three main forms of ADR and the traditional form of litigation that proceeds to trial.

TABLE 11.1 Selecting the Right ADR Process

Process	Negotiation	Mediation	Arbitration	Litigation
Third-party intervention	No	Yes	Yes	Yes
Choice of third party	n/a	Usually parties select on agreement	Usually parties select on agreement	No, assigned by court
Role of third party	n/a	Helps facilitate a settlement	Assesses evidence and arguments and makes binding decision	Assesses evidence and arguments and makes binding decision
Decision outcome	Not binding	Not binding	Usually binding	Binding on parties
Confidentiality	Yes, private	Yes, private	Usually private but may be public	No, public court process
Participation of parties	Voluntary	Usually voluntary	Usually voluntary	Coercive
Style of participation of parties	Collaborative	Collaborative	Adversarial	Adversarial
Process and rules of procedure	Informal, flexible	Informal, flexible	More formal, somewhat flexible	Formal, inflexible

Choosing the Best ADR Process for the Client

Determining which ADR process will work best for the client involves several considerations. In assessing a legal case, the legal representative would need to consider whether it would be suited to a more rights-based adjudicative process with a binding decision such as arbitration and litigation, or a collaborative-based process such as negotiation and mediation. There are several factors to be addressed in making that assessment. Author Ann Grant, in her book *Dispute Resolution in the Insurance Industry: A Practical Guide*,[1] set out a useful checklist (see the box below, "Checklist of Possible ADR Criteria") of possible ADR screening criteria for insurance claims. It has been adapted throughout this book—and especially in this chapter—to apply to civil cases in general.

Type of Legal Issue

The legal representative, should review the legal issues in the dispute and look at how similar disputes are handled through ADR processes. Specifically, the representative needs to know whether similar types of matters are often settled through a particular form of ADR. It is also important to know how many of those similar cases end up at trial. For example, more family law cases are using forms of ADR intervention and collaborative law to settle custody disputes and separation agreements instead of going to court. Some disputes are not suited to ADR consensus-based processes that rely heavily on the trust and good faith of the parties. Legal matters that involve some form of fraud or bad faith may lead to concerns over fraud in the ADR process, impacting credibility and trust, and would not be appropriate for ADR.

PRACTICE TIP

The representative must recognize that legal issues and how they are handled can change over time. Current issues, public policy, and shifting societal norms can very quickly affect the legal landscape. The #MeToo movement is a useful example of the speed within which these changes can take place. #MeToo is a social movement against sexual abuse and sexual harassment that went viral in October 2017. It encouraged people to publicize allegations of sex crimes, especially in the workplace, by posting #MeToo in their online status. Since that time, the movement has had a significant impact on society, professional regulators, and the legal profession as a whole. New laws swiftly brought about change, including continuing education for superior court judges on matters related to sexual assault law and social context, and regulatory changes to legal processes.

The changes to the *Judges Act* mean that in order to be eligible for appointment to a provincial superior court, candidates must agree to participate in continuing education on matters related to sexual assault law and social context, which includes systemic racism and systemic discrimination. Social context is influenced by societal factors such as gender, race, ethnicity, religion, culture, sexual orientation, differing mental or physical abilities, age, and socio-economic background and familiarity with issues related to family violence and violence against children.[2]

2 Department of Justice Canada, "New Law on Continuing Education of Judges Will Enhance Sexual Assault Survivors' Confidence in the Criminal Justice System" (21 May 2021) at para 2, online: *Government of Canada* <https://www.canada.ca/en/department-justice/news/2021/05/new-law-on-continuing-education-for-judges-will-enhance-sexual-assault-survivors-confidence-in-the-criminal-justice-system.html>.

Litigation Process and Jurisdiction

Legal representatives need to review the litigation process as it relates to each case. For example, a landlord and tenant dispute may require mandatory mediation as part of the tribunal process, whereas mediation for a matter before the Human Rights Tribunal may be optional. The first step is to determine whether the matter is before a court or tribunal. Next, representatives must determine the dispute resolution processes that may apply to that particular tribunal or court. They will be required to carefully review any applicable legislation, regulations, rules of procedure, practice directions, guidelines, or other updates. Required ADR processes and legislation vary across different jurisdictions. Certain provinces may offer ADR processes that others do not. Even tribunals that are subject to similar rules of procedure will have their own ADR processes and often refer to them by different names. The Social Benefits Tribunal in Ontario provides a dispute resolution opportunity to resolve appeals through the Early Resolution Opportunities program. The Human Rights Tribunal of Ontario only appears to use mediation in their rules of procedure. Legal representatives must continually review tribunal processes that apply to individual tribunals.

Legal Representatives

Consideration should be given to the style and history of the opposing legal representative. Certain firms and individual practitioners are often known to behave and manage legal files in a particular way. For example, a lawyer may be known for avoiding settlement discussions at mediation and instead prefer to wait until just before trial to settle in anticipation of a larger settlement. Other representatives exhibit clear patterns of behaviour that dictate how settlements may unfold, including sharp practice or dirty tactics. As a result, when a representative is assigned to a file, representatives should always adjust the ADR option recommendations to the client based on the historical patterns of settlement of the opposing representative and/or firm.

Some practitioners may have a particular history or relationship that could determine which ADR process to apply. For instance, some legal representatives may have a history of bargaining in bad faith, taking extreme positions, and bringing client representatives to the mediation who do not have the proper authority to reach a settlement. These kind of tactics may be an attempt to intentionally raise the parties' costs. In these situations, it is advisable to avoid going to voluntary mediation altogether or to request that authority is confirmed ahead of attending the mediation.

Stage of the Legal Action

Determining when to introduce an ADR process depends on which stage the legal action is at. In some insurance cases, it is common for mediations to take place prior to the statement of claim being issued.[3] In civil cases that involve some form of a discovery process, a private mediation would best be held after discovery has taken

3 Grant, *supra* note 1 at 13.

place and the undertakings complied with. At that point, the parties may feel that most of the evidence has been gathered and received in order to make a proper determination for settlement. Of course, settlement negotiations may take place at any time throughout the litigation process, including on the doorstep of the court just before heading into trial. In fact, some negotiated settlements may even take place midway through trial. For example, if their client's testimony and examination during the trial do not appear to be going well, the representative may need to advise the client to negotiate a settlement before waiting for a final judgment of a judge or jury that may not be in their client's favour. It may be better for the client to have some control over the final outcome by negotiating a settlement.

Depending on whether a case has mandatory mediation may also determine which ADR options are available to the client. Cases that have mandatory mediation would preclude implementing arbitration.

Length of the Conflict

A delay in proceeding to court is a common reason for selecting an ADR method. The overall costs of an action will increase the longer a legal proceeding takes. These costs include administrative costs, maintaining a file, back-and-forth correspondence in preparation for trial, general legal fees, and the overall personal time and cost to a client. The personal cost to the client includes not only out-of-pocket costs but also psychological costs (stress, emotions, etc.). The longer the conflict, the more emotionally attached the parties become to their position. Over time, the parties become more entrenched in their positions, and they may be less likely to settle. As ego becomes associated with a possible outcome, the only objective is winning under any circumstance. Any settlement would be perceived as a loss. In addition, clients must determine whether not they can afford to wait for a decision by the court. Some businesses and individuals may require a quicker outcome so they can avoid having their money tied up in a lengthy trial process. For example, a contractor who is suing a homeowner for a big renovation job may be forced into bankruptcy as they are unable to recoup the money they are owed. The contractor may not be able to wait three years for a trial outcome in order to continue with their business.

Whether All the Evidence and Documentation Has Been Obtained

It is difficult to enter into any settlement without having all the information related to the case. Therefore, considering which ADR process to apply will largely depend on how much evidence and documentation has been gathered to date. For example, in a case between an insured and an insurance company providing benefits for injuries sustained from a car accident, the defendant insurance company would need to ensure that all documentation has been received from the plaintiff, including doctor's reports, medical records, treatment receipts, expert reports, police reports, proof of income loss, and any other documentation necessary for assessing the extent of the injuries. These important documents are considered objective criteria which will help the parties to determine whether to settle a case.

Quantum Being Claimed

quantum of damages the amount of monetary compensation that may be awarded to a successful party in a claim

The **quantum of damages** being claimed in a legal action may impact the timing and which ADR method to apply. If a significant amount is being claimed, the parties may want to mediate the matter early in order to limit the long-term liability. For example, an opposing party may have injuries that exacerbate or increase over time. An early settlement will limit the liability of the client. However, even small sums claimed may be better suited to early mediation so as to limit the overall costs of the action. A client may even be encouraged to negotiate settlement prior to issuing a statement of claim to avoid the costs associated with litigation. Consideration should also be given to recognizing that it is rare for cases to settle for the full amount that is claimed in the plaintiff's claim. Legal representatives will often claim a high amount as a scare tactic to the opposing party. It is also a method used in some small claims jurisdictions where the percentage of costs awarded are calculated based on the quantum of damages outlined in the plaintiff's claims. In addition, the legal representative must make the client aware of rules around cost consequences in the event the client loses at trial. The failure to accept an offer to settle may trigger cost consequences in certain situations. According to Rule 14.07 of the Small Claims Court in Ontario, a successful party may be awarded a representation fee of twice the costs of the action and the losing party may face paying up to twice the costs.

Costs Consequences of Failure to Accept

14.07(1) When a plaintiff makes an offer to settle that is not accepted by the defendant, the court may award the plaintiff an amount not exceeding twice the costs of the action, if the following conditions are met:

1. The plaintiff obtains a judgment as favourable as or more favourable than the terms of the offer.
2. The offer was made at least seven days before the trial
3. The offer was not withdrawn and did not expire before the trial. O. Reg. 258/98, r. 14.07 (1).

(2) When a defendant makes an offer to settle that is not accepted by the plaintiff, the court may award the defendant an amount not exceeding twice the costs awardable to a successful party, from the date the offer was served, if the following conditions are met:

1. The plaintiff obtains a judgment as favourable as or less favourable than the terms of the offer.
2. The offer was made at least seven days before the trial.
3. The offer was not withdrawn and did not expire before the trial.[4]

4 *Rules of the Small Claims Court*, O Reg 258/98, Rule 14 07, online: <https://www.ontario.ca/laws/regulation/980258>

If the quantum of damages is not yet quantifiable, any form of ADR may be premature. This goes hand in hand with ensuring that all of the documentation and evidence has been received in order to properly assess and quantify the damages in a case.

Cost–Benefit Analysis of Litigation Versus ADR

In any evaluation of an ADR process, it is critical to provide the client with a cost–benefit analysis of proceeding to trial versus settling through ADR. This projection of actual costs and damages awarded is an important part of assessing the risk of proceeding to trial. Therefore, the client should be clear about those prospective costs. First, it is important for the client to understand that it is rare for cases to settle for the full amount that is claimed. As indicated above, a full claim is often used as a scare tactic toward the opposing party, but also as protection for the client as it is difficult to increase the claim after it has been filed. Second, there is always a risk in going to court of obtaining a judgment that may not be in the client's favour. This legal risk can be quantified and measured depending on the type of action. Third, the client should be clear about additional potential costs in the course of heading to trial. Motions, injunctions, and other legal processes can quickly add up the costs of a seemingly "simple" legal matter before finally heading to trial. Fourth, even if the client wins the case, not all costs associated with the file are usually recovered by the successful party. In fact, some tribunals do not allow any recovery of costs. For example, the *Statutory Powers Procedure Act*[5] in Ontario limits cost recovery to situations where the conduct of a party has been unreasonable, frivolous, vexatious, or in bad faith. This must be factored into the cost–benefit analysis for the client in considering early ADR options. Of course, this analysis may mean less profit to be made by the legal representative due to the legal action resolving more quickly. However, the client's appreciation of the representative's honest assessment of the costs will result in more client referrals and return business in the long run. It is important for the legal representative to always put their client's interests first.

Relationships

The long-term relationship between the parties is an important consideration for ADR. A representative should determine if the client has a long-term relationship with the opposing party such as a neighbour, colleague, relative, or employer that may be negatively affected in the long term if the matter heads to trial. Going to trial will result in a winner and a loser. For example, there are many matters between neighbours that end up in small claims court. Assuming the matter proceeds to trial, one neighbour will be very unhappy with the result. While the legal representatives can subsequently head their separate ways, the neighbours still have to return home and live beside each other for years to come. Employers and employees must be able to continue to work together. Preserving these long-term relationships is an important reason why many organizations are diverting disputes out of court and into some form of dispute resolution.

5 RSO 1990, c S.22.

Choosing the Right Third-Party Dispute Resolver

Legal representatives must properly assess the legal case and consider which third-party dispute resolver would best meet the needs of the case. The legal representative must assess and advise the client about the importance of having a decision-maker who is an expert in legal realm being disputed. In public court proceedings, the parties do not have any input on selecting the judge as the adjudicator. They cannot be certain that the judge has any specific experience or expertise in certain areas. This can be particularly risky for clients who are dealing with legal issues that are very specialized. In arbitration, the parties can select an adjudicator that is an expert or knowledgeable in that area. However, due to the confidential nature of the arbitration process, there is also an inevitable lack of accountability and transparency. This may result in a greater risk of having an adjudicator who is biased and/or influenced by certain parties or issues in the industry. Clients who have concerns about the influence of opposing parties on the arbitration may prefer to stick with the public court system, which offers a more transparent process of adjudication.

While mediators are not decision-makers, they can be intentionally selected as experts in a matter to help facilitate a resolution. Unlike arbitration and trial, mediation does not offer third-party dispute resolvers. Instead, mediators are facilitators who are usually selected and agreed upon by the parties. They are not adjudicators who can impose a binding decision on the parties. This may be seen as beneficial to the parties as they may feel more open to considering settlement options and sharing their position and interests without fearing that the mediator will use the information against them and impose a binding decision. Mediators can be particularly useful in the facilitation of brainstorming options and drafting settlement agreements. Like arbitrators, they are often specialized and can draw on their knowledge and experience in assisting the parties with decision-making in evaluative mediation. Mediators may also be chosen based on their specialization in particular legal areas of expertise and their methodology during the mediation such as a facilitative mediator or an evaluative mediator.

Public Consideration and Precedent

A clear distinction between going to trial and using an ADR process is confidentiality. A trial is a public process requiring that documents be filed and made accessible to the public. An open trial can be attended by the public and a public decision made that is binding and precedent-setting. In some cases, a legal precedent may be important to clarify legislation for future cases or to hold the party accountable for their actions. For example, civil trials that settle and never make it to trial may allow a party to continue their improper behaviour. An insurance company that wrongfully refuses an insured's claims might continue to behave this way in the long run and avoid legal action. The insurance company simply settles with each insured and ensures the insureds are bound by confidentiality agreements in the settlement agreements not to disclose anything about their unlawful behaviour. Conversely, ADR processes are confidential and private in nature. Many corporations that wish

Advocacy for Arbitration 10

Learning Outcomes

After reading this chapter, you will be able to:

- Develop an understanding of the needs of the main stakeholders in an arbitration.
- Learn to assess the viability of your client's position.
- Manage both oral and documentary evidence.
- Define your role as a legal representative in arbitration.
- Formulate the basis of legal arguments before an arbitrator.
- Apply the concepts from this chapter to a recurring conflict case scenario.

ADR Worksheet for Arbitration
Condominium Pet Dispute: Paralegal

My Client's Position – What is my client seeking?

1. _____

My Client's Interests – Why is my client seeking what they are seeking? What they really care about (i.e., their wants, needs, concerns, hopes, and fears)

1. _____
2. _____
3. _____
4. _____

Opposing Party's Position – What do I think they are seeking?

1. _____

Opposing Party's Interests – Why are they seeking what they are seeking? What I think they really care about (i.e., their wants, concerns, hopes, and fears)

1. _____
2. _____
3. _____
4. _____

Arguments to Support My Client's Position – Key facts that should be summarized in the opening statement

1. _____
2. _____
3. _____
4. _____
5. _____

Evidence – Evidence that can be used at arbitration. *Be specific to the scenario.*

1. _____
2. _____

ADR Worksheet for Arbitration
Condominium Pet Dispute: Arbitrator

Position: Party A – What do I think they are seeking?

What is Party A's position? *Please identify who is Party A.*

1. _____

Position: Party B – What do I think they are seeking?

What is Party B's position? *Please identify who is Party B.*

1. _____

Interests: Party A – Why are they seeking what they are seeking? What I think they really care about (i.e., their wants, concerns, hopes, and fears).

What are Party A's interests?

1. _____
2. _____
3. _____
4. _____

Interests: Party B – Why are they seeking what they are seeking? What I think they really care about (i.e., their wants, concerns, hopes, and fears).

What are Party B's interests?

1. _____
2. _____
3. _____
4. _____

Speaking Sequence

Who will I ask to speak first? Why?

1. _____

_____

Appropriateness of Arbitration

Why will arbitration be an appropriate way to deal with this dispute?

1. _____

_____

Appendix D Role Play: Condominium Pet Arbitration

Participants: One or two arbitrators, two parties, two representatives

Level of Difficulty: Medium

Time: Set aside a minimum of 60 minutes to complete the preparation and conduct the arbitration

Objectives

- Develop advocacy skills in an arbitration
- Draft preparation sheets, opening statements, examination in chief and cross-examination questions, and closing statements
- Demonstrate how some disputes are better resolved through arbitration than litigation.

Preparation

- Divide the students into groups of five or six (if there are six students in a group, two students should co-arbitrate)
- Assign a role to each student
- Ask students to read their roles
- The legal representatives should complete the "ADR Worksheet for Arbitration (Paralegal)"
- The arbitrators should complete the "ADR Worksheet for Arbitration (Arbitrator)"

Note: This assignment would be best prepared in advance of the actual activity that day. For a quicker arbitration, students may complete only parts of the arbitration.

Debriefing with Students

1. Why is this an appropriate matter to go to arbitration?
2. How would your opening statement have differed if it had been prepared for a mediation?
3. What did you learn from this arbitration that will help you in your future practice as a legal representative?
4. Do you think this scenario will result in a win–win solution? Explain why or why not.

Condominium Pet Dispute

General Facts of the Case for Both Paralegals and the Arbitrator

The matter involves a resident, Claudia Benoit, and her husband Charles, who recently moved into their unit in June along with their much-loved Labrador retriever Jasper, even though the building has a no-pet policy. The condominium board has received many complaints from neighbours in the building about the dog. They approached the Benoits and asked them remove the dog or sell their unit and move out of the condominium. Claudia has refused, and claims that her real estate agent did not disclose to her that the building had a zero pet-policy. She further states that she suffers from a severe anxiety disorder and the dog is very important to the couple as the dog is therapeutic for her anxiety.

Claudia's claim is that her anxiety disorder is a disability. That has made the situation more complicated, as Claudia believes she should be able to keep Jasper based on her disability. The *Human Rights Code* prevents discrimination on the basis of disability. Therefore, if Claudia's anxiety is found as a disability under the Code, and she relies on the dog for therapy, then it is likely she would be able to keep Jasper regardless of the policy of the condominium.

All the residents have signed a condominium agreement that includes a *Scott v Avery* clause stating that in the event of a dispute between any of the condominium residents or the board, the parties agree to first attempt mediation, and if a settlement is not reached, to attend arbitration and the decision will be final and binding on the parties.

The parties attempted mediation; however, 15 minutes after the mediation started, Claudia left the mediation as she felt she was having a panic attack. Charles continued to attend on her behalf, however they were unable to resolve the matter. Medical experts have been consulted on two key issues: first, whether Claudia has a genuine disability as set out in the *Human Rights Code*; and second, whether the dog Jasper is a necessary therapy for Claudia's disability. Both of these issues must be satisfied for Claudia to keep the dog. If not, either the Benoits will have to remove Jasper from their unit or move out of the condominium building.

Condominium Pet Dispute

Role for the Condominium Board's Paralegal

You are a paralegal who has been retained to represent the board of a condominium corporation in an arbitration. You have met with your client and have hired some medical experts to provide evidence about

Appendix D Continued

Claudia's anxiety at the arbitration hearing. In preparation for the arbitration, draft the following:

1. Paralegal Preparation Worksheet
2. Opening statement for the condominium board
3. Examination in chief questions for the board
4. Examination in chief questions for the medical expert hired by the board
5. Cross-examination questions for the opposing party, Claudia
6. Cross-examination questions for the medical experts called by the opposing party
7. Closing statement on behalf of the condominium

Role for the Claudia Benoit's Paralegal

You are a paralegal who has been retained to represent a resident, Claudia Benoit, in an arbitration.

1. Paralegal Preparation Worksheet
2. Opening statement for Claudia
3. Examination in chief questions for Claudia
4. Examination in chief questions for the medical expert hired by Claudia
5. Cross-examination questions for the opposing party, the condominium board
6. Cross-examination questions for the medical experts called by the opposing party
7. Closing statement on behalf of Claudia

Role for the Arbitrators

You are an experienced arbitrator who specializes in condominium disputes. You will be presiding over an arbitration between the resident and condominium board.

Source: Adapted from J Cazzin, "Handling the Jerk Next Door," *Money Sense*, (28 December 2011), online. <https://www.moneysense.ca/spend/real-estate/the-jerk-next-door>.

Appendix C Key Excerpts from the Arbitration Act, 1991

SO 1991, c 17

Definitions

1. In this Act,

"arbitration agreement" means an agreement by which two or more persons agree to submit to arbitration a dispute that has arisen or may arise between them;

...

Application of Act

Arbitrations conducted under agreements

2(1) This Act applies to an arbitration conducted under an arbitration agreement unless,

(a) the application of this Act is excluded by law; or

(b) the *International Commercial Arbitration Act* applies to the arbitration.

Arbitrations conducted under statutes

(3) This Act applies, with necessary modifications, to an arbitration conducted in accordance with another Act, unless that Act provides otherwise; however, in the event of conflict between this Act and the other Act or regulations made under the other Act, the other Act or the regulations prevail.

Contracting out

3. The parties to an arbitration agreement may agree, expressly or by implication, to vary or exclude any provision of this Act except the following:

1. In the case of an arbitration agreement other than a family arbitration agreement,
   i. subsection 5(4) ("*Scott v. Avery*" clauses),
   ii. section 19 (equality and fairness),
   iii. section 39 (extension of time limits),
   iv. section 46 (setting aside award),
   v. section 48 (declaration of invalidity of arbitration),
   vi. section 50 (enforcement of award).

...

Arbitration agreements

5(1) An arbitration agreement may be an independent agreement or part of another agreement.

...

Revocation

(5) An arbitration agreement may be revoked only in accordance with the ordinary rules of contract law.

...

Court intervention limited

6. No court shall intervene in matters governed by this Act, except for the following purposes, in accordance with this Act:

1. To assist the conducting of arbitrations.
2. To ensure that arbitrations are conducted in accordance with arbitration agreements.
3. To prevent unequal or unfair treatment of parties to arbitration agreements.
4. To enforce awards.

Stay

7(1) If a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding.

Exceptions

(2) However, the court may refuse to stay the proceeding in any of the following cases:

1. A party entered into the arbitration agreement while under a legal incapacity.
2. The arbitration agreement is invalid.
3. The subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law.
4. The motion was brought with undue delay.
5. The matter is a proper one for default or summary judgment.

...

Powers of court

8(1) The court's powers with respect to the detention, preservation and inspection of property, interim injunctions and the appointment of receivers are the same in arbitrations as in court actions.

Appendix C Continued

Questions of law

(2) The arbitral tribunal may determine any question of law that arises during the arbitration; the court may do so on the application of the arbitral tribunal, or on a party's application if the other parties or the arbitral tribunal consent.

Appeal

(3) The court's determination of a question of law may be appealed to the Court of Appeal, with leave.

...

Number of arbitrators

9. If the arbitration agreement does not specify the number of arbitrators who are to form the arbitral tribunal, it shall be composed of one arbitrator.

...

Duty of arbitrator

11(1) An arbitrator shall be independent of the parties and shall act impartially.

...

Rulings and objections re jurisdiction

Arbitral tribunal may rule on own jurisdiction

17(1) An arbitral tribunal may rule on its own jurisdiction to conduct the arbitration and may in that connection rule on objections with respect to the existence or validity of the arbitration agreement.

...

Equality and fairness

19(1) In an arbitration, the parties shall be treated equally and fairly.

Idem

(2) Each party shall be given an opportunity to present a case and to respond to the other parties' cases.

Procedure

20(1) The arbitral tribunal may determine the procedure to be followed in the arbitration, in accordance with this Act.

...

Evidence

21. Sections 14, 15 and 16 (protection of witnesses, evidence at hearings, notice of facts and opinions) of the *Statutory Powers Procedure Act* apply to the arbitration, with necessary modifications.

Time and place of arbitration

22(1) The arbitral tribunal shall determine the time, date and place of arbitration, taking into consideration the parties' convenience and the other circumstances of the case.

...

Enforcement by court

25(7) The court may enforce the direction of an arbitral tribunal as if it were a similar direction made by the court in an action.

Hearings and written proceedings

26(1) The arbitral tribunal may conduct the arbitration on the basis of documents or may hold hearings for the presentation of evidence and for oral argument; however, the tribunal shall hold a hearing if a party requests it.

...

Application of law and equity

31. An arbitral tribunal shall decide a dispute in accordance with law, including equity, and may order specific performance, injunctions and other equitable remedies.

...

Appeals

Appeal on question of law

45(1) If the arbitration agreement does not deal with appeals on questions of law, a party may appeal an award to the court on a question of law with leave, which the court shall grant only if it is satisfied that,

(a) the importance to the parties of the matters at stake in the arbitration justifies an appeal; and

(b) determination of the question of law at issue will significantly affect the rights of the parties.

Appendix A ADR Institute of Canada Arbitration Rules—Table of Contents

To access the complete document (ADRIC Arbitration Rules), go to the ADR Institute of Canada website at <https://adric.ca/rules-codes/arbrules/>.

TABLE OF CONTENTS

Appendix B ADR Institute of Canada Code of Ethics

CODE OF ETHICS

This code is applicable to all members of the ADR Institute of Canada.

1. A Member shall uphold and abide by the Code of Ethics, the Code of Conduct for Mediators, the regulations, and other professional requirements adopted by the ADR Institute of Canada.
2. A Member shall not carry on any activity or conduct which could reasonably be considered as conduct unbecoming of a member of the ADR Institute of Canada.
3. A Member shall uphold the integrity and fairness of the arbitration and mediation processes.
4. A Member shall ensure that the parties involved in an arbitration or mediation are fairly informed and have an adequate understanding of the procedural aspects of the process and of their obligations to pay for services rendered.
5. A Member shall satisfy him/herself that he/she is qualified to undertake and complete an appointment in a professional manner.
6. A Member shall disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality or bias.
7. A Member, in communicating with the parties, shall avoid impropriety or the appearance of impropriety.
8. A Member shall conduct all proceedings fairly and diligently, exhibiting independence and impartiality.
9. A Member shall be faithful to the relationship of trust and confidentiality inherent in the office of arbitrator or mediator.
10. A Member shall conduct all proceedings related to the resolution of a dispute in accordance with applicable law.

Source: ADR Institute of Canada, "Code of Ethics," online: *ADR Institute of Canada* <http://adric.ca/rules-codes/code-of-ethics>

CHAPTER SUMMARY

Arbitration as a process is distinguished from that of negotiation and mediation in that it involves a neutral third party who hears evidence and makes a final and usually binding decision. Arbitrations are achieved either by statute or by contractual agreement as a means of circumventing the litigation process. Arbitrators are selected for a number of reasons, they may be experts in a particular subject, or they may have a reputation for fair decisions.

Ontario's *Arbitration Act* governs arbitrations by providing structure and fairness to arbitral proceedings and by ensuring that the judiciary will not unnecessarily interfere with the proceedings or outcome of an arbitration.

Not all arbitrations are conducted in the exact same way, but they are more formal than mediation or negotiations. This chapter explored the three distinct stages: before the hearing, at the hearing, and after the hearing.

An issue may be appropriate for arbitration when mediation and/or negotiation have failed to produce results but the parties are still interested in avoiding the costs of litigation, expediting the decision, or achieving a creative remedy. Arbitration may also be appropriate when variables relating to venue or to jurisdiction may complicate resolving a dispute.

KEY TERMS

ad hoc arbitration, **219**
arbitration, **216**
Arbitration Act, **219**
arbitration award, **216**
compulsory arbitration, **217**
consensual arbitration, **219**
High-Low or Bracketed Arbitration, **226**
Last Best Offer Arbitration, **226**
Non-Binding Arbitration , **226**
Scott v Avery clause, **219**

REVIEW QUESTIONS

1. When parties want an expert adjudicator to make a binding decision relating to their dispute, which of the following methods should they select?
   a. Negotiation
   b. Mediation
   c. Arbitration
   d. Litigation.
2. Which of the following statements best describes the benefits of arbitration as a method of dispute resolution?
   a. It allows the parties the freedom to arrive at their own resolution, it is cheaper than litigation, and it is confidential.
   b. It is cheaper than litigation, it is confidential, and it allows for a decision make with subject-matter expertise.
   c. Although it is more expensive than litigation, it allows for matters to be made public and provides the process with adjudicators that are more expert in the subject matter.
   d. It allows the parties to overrule the final and binding decision of the adjudicator if they are dissatisfied with the result.
3. What is an arbitration that is mandated by statute called?
   a. Ad hoc arbitration.
   b. *Scott v Avery* arbitration.
   c. Consensual arbitration.
   d. Compulsory arbitration.
4. Which of the following best describes a *Scott v Avery* clause?
   a. A provision in an agreement indicating that the parties intend to circumvent litigation.
   b. A contractual indication that the parties prefer to seek the court's initial review before proceeding to arbitration.
   c. A provision in an agreement that indicates that arbitration has been mandated by statute.
   d. A provision in a court decision that indicates the decision of the arbitrator is deemed to be unjust.
5. What are arbitration acts?
   a. They are laws created by a legislature indicating that arbitration procedures are legal only when pre-approved by the courts.
   b. They are statutes created in American jurisdictions that have yet to be enacted by any Canadian provincial legislature.
   c. They are laws created by a legislature indicating the main features of the proceedings and the limited role the courts play in reviewing them.
   d. The are publications listing the most recent decisions of arbitrators in the relevant jurisdiction.

SHORT ANSWER QUESTIONS

1. Name the methods that parties can use to circumvent litigation and arrive at arbitration.
2. What is an arbitration award and how is it enforced?
3. Name the benefits of arbitration over the process of litigation.
4. Under what circumstances might litigation be preferable to negotiation or mediation?
5. When drafting an arbitration clause to insert into a commercial agreement, what are the main elements that would need to be included?
6. Describe three types of arbitration Last Best Offer Arbitration, High-Low Arbitration, and Non-Binding Arbitration.

EXERCISE

1. Arbitration Role Play: Condominium Pet Dispute (see Appendix D)

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the Ontario *Employment Standards Act, 2000*.[14] All drivers enter into a standard form contract with Uber as independent contractors. The contract required that any disputes between Uber and its drivers be resolved by arbitration in the Netherlands, in accordance with the rules of the International Chamber of Commerce, a process involving upfront costs of $14,500 USD. Heller argued that the arbitration clause was not enforceable on the basis that it was unconscionable as it provided a costly unequal bargaining power between Uber and the drivers. The Supreme Court of Canada held in an 8-1 decision that the arbitration clause was unenforceable in Ontario, as it denied Heller access to justice, was contrary to public policy, and that Heller could pursue the complaint against Uber in Ontario courts.

FIGURE 9.2 Comparing Arbitration to Negotiation/Mediation and Litigation

NEGOTIATION/MEDIATION	ARBITRATION	LITIGATION
Process is less adversarial than arbitration.		Process is more adversarial than arbitration.
It encourages more communication between the parties than arbitration.		It encourages less communication between the parties than arbitration.
Lawyers have less involvement than in arbitration.		Lawyers have the same involvement as in arbitration.
As in arbitration, parties have control of confidentiality.		Unlike in arbitration, parties have no control of confidentiality.
Process is less expensive than arbitration.		Process is more expensive than arbitration.
Parties are more likely to cooperate in the future than in arbitration.		Parties are less likely to cooperate in the future than in arbitration.
Parties have more control over process than in arbitration.		Parties have less control over process than in arbitration.
Parties have less ability to access or discover evidence than in arbitration.		Parties have more ability to access or discover evidence than in arbitration.
Process is less formal than arbitration.		Process is more formal than arbitration.
It provides a better opportunity to maintain a future relationship than arbitration.		It provides much less opportunity to maintain a future relationship than arbitration.
It provides a higher likelihood the parties will be satisfied with the outcome.		It provides a lower likelihood the parties will be satisfied with the outcome.
The result or resolution to the dispute has the potential to be more creative than in arbitration.		The result or resolution to the dispute is less likely to be as creative as in arbitration.

Source: Adapted from Norman Pickell, "Comparison of Mediation, Arbitration, and Court," online: <https://web.archive.org/web/20191125102743/http://www.normanpickell.com/comadrmedct.htm>. Reprinted with permission.

14 2000, c 41.

RECURRING CASE STUDY

What Is Arbitration?

To briefly recap, the issue surrounding the damaged figure skates was resolved at mediation (see Recurring Case Study in Chapter 8). However, in order to demonstrate how arbitration could have been used to resolve this matter, an alternate outcome is presented below.

Alternate Outcome

After the unsuccessful attempts at negotiation (see Recurring Case Study in Chapters 5 and 6), Angela decided that she would commence a small claims court action. When she went to the court office, she was surprised to find out that it would be several months, or possibly even a year, before she could get a court date. She was not willing to wait that long.

Angela contacted her former paralegal and asked if there was anything else that she could do. The paralegal suggested hiring a private arbitrator and recommended one who he had used in the past because he has experience in assessing damages. He also indicated that he would be willing to represent Angela at the arbitration—pro bono—because he was considering expanding his paralegal practice to include ADR services and would like to be involved in an arbitration.

The paralegal then explained the pros and cons of arbitration, confirmed with his provincial law society that a paralegal would be permitted to provide representation, contacted Mary and Leo to see if they would be agreeable to arbitration, and booked the arbitrator for the upcoming week.

Discussion of Scenario

- *Arriving at Arbitration by Agreement*: Angela, Mary and Leo decided to opt into arbitration. It was not required by a contract or statute. Instead, the parties decided to pursue private arbitration instead of going through the court system.
- *Consulting Provincial Law Society*: In order to act as a representative in arbitration, Angela's paralegal consulted with his provincial law society (e.g., LSO) in order to ensure that such representation would fall within the paralegal scope of practice. It is advisable for paralegals to always seek such confirmation for arbitration matters.
- *Scheduling the Arbitration*: The parties can have an arbitration decision much more quickly than they could obtain a court verdict. Since Angela did not want to wait several months for the matter to be resolved, arbitration presented a more efficient option.
- *Selecting an Arbitrator*: Since there are no credential requirements to become an arbitrator, it is important to research potential arbitrators. Angela's paralegal was able to suggest an experienced arbitrator who he had worked with in the past.
- *Preparation for Arbitration*: Angela's paralegal took the time to explain the pros and cons of arbitration so that Angela could decide if it was the option that she wanted to pursue.

to preserve their trade secrets, finances, or other actions may prefer a private form of ADR over going to a public trial. In the case of mediation, the confidential nature of settlement means that parties can avoid admitting to any liability and keep the terms of any settlement confidential.

Arbitration is slightly different, since a binding decision is usually made and liability attributed by way of an award. However, that award may also be confidential along with the hearings themselves. Choosing ADR may limit the amount of media attention and the overall adverse impact on the client. Of course, the confidential nature of ADR limits the accountability and public scrutiny of the matter. This can be problematic for clients if there is a power imbalance or risk of bias by the adjudicator. For example, large corporations may exert inappropriate influence. In those cases, trial may be a more appropriate venue to reduce those hazards.

CHECKLIST OF POSSIBLE ADR CRITERIA

- ☑ type of issue
- ☑ identity of other parties and their relationship
- ☑ presence or absence of supporting documentation
- ☑ quantum in issue
- ☑ cost–benefit analysis
  - current administrative and legal costs of the file
  - anticipated administrative and legal costs of the file
  - presence of reserves in relation to the actual and anticipated costs of pursuing the file
  - total cost of the file in relation to average costs (i.e., whether the costs of this file have exceeded the average costs of other similar files)
- ☑ litigation analysis
  - stage of the lawsuit
  - pre-pleadings
  - case-managed
  - court-mandated ADR
  - pre-discovery
  - post-discovery
  - pre-trial
  - trial preparation
  - trial commenced
- ☑ province/jurisdiction of the case
- ☑ identified trends
- ☑ counsel on file
- ☑ precedent value of the file
- ☑ public scrutiny
- ☑ relationship aspect of the dispute

Source: Based on AE Grant, *Dispute Resolution in the Insurance Industry: A Practical Guide* (Aurora, Ont: Canada Law Book, 2000).

Understanding the Relationship between the Client and the Legal Representative

Understanding why someone might choose to be represented by a legal representative is an important part of providing the client with the best representation possible in ADR. As an agent for their client (principal), legal representatives are subject to all of the rights and responsibilities of the agent–principal relationship. A critical aspect of that role is to recognize any possible risks to the agent–principal relationship and manage them accordingly, and ultimately develop a stronger sense of trust with the client.

Minimize Potential Risks Associated with the Client Relationship

Most principals in an "agency" type of relationship seek representation because they are relying on an agent's technical expertise or negotiating skills to best represent their interests in ADR. This is the same for the relationship between the legal representative and the client. Additionally, some clients use their representative as a means to limit their emotional involvement, particularly when the stakes are high and the relationships are tense with the opposing party. The client may also want to use the legal representative as a sort of shield to avoid having to react or respond to the opposing party immediately, or to try out certain options without personal implications. However, there are implications that the legal representative should be aware of.

First and foremost is the risk of different agendas that may exist between the legal representative and the client. It is the obligation of the legal representative to act in the best interest of the client. However, the mere fact that a legal representative may carry their own biases, personality, and ideology adds an element of risk for the client. For example, a legal representative may be a passionate animal rights activist who, in a legal action, may be asked to defend a client who is accused of abusing a pet. The legal representative must ensure that they always act in the best interest of their client regardless of their own ideology or bias. Any difference in agenda should not be a factor in representing their client. In the event the legal representative is not able to overcome their own bias, it may be best that they decline being retained by that client, assuming the circumstances allow for it.

Personality differences may also present a concern between the client and legal representative. For example, a client may be extremely assertive and demanding, and may feel that the only goal of a legal action is to go to court and obtain a decision from a judge. A client may be so set on a particular position in a conflict that they are unable to comprehend any other considerations in a legal action. In this example, the legal representative knows that most cases do not end up in court and usually settle through some form of ADR. The legal representative must help the client understand that there are significant consequences and risks of going to court that the client may not have properly contemplated, such as the long-term impact on relationships and the excessive costs of going to court. The legal representative should thus make recommendations to the client setting out these important considerations. However, the client, as the ultimate decision-maker, may not agree with the manner in which

they approach the legal action. Minimizing the risks of a different agenda is the legal representative's responsibility and duty.

Another concern of the legal representative's relationship with the client is any prior tension that may already exist between the two bargaining legal representatives in the legal action. They may have already negotiated together or opposite one another in another legal matter. The legal community is very small; legal representatives will likely encounter the same representatives in multiple cases. While most legal representatives try not to carry any past emotional baggage into negotiations, there is no way to be certain of this. In most cases, legal representatives develop a good working relationship with each other. However, some representatives have been known to engage in sharp practice, that is, creating tension, causing mistrust, and developing poor working relationships over the long term. For example, a representative may try to take advantage of a small typographical error or an email or fax that was sent incorrectly. In other cases, senior representatives may try to intimidate junior representatives based on lack of experience. In one particular case, a senior representative brought a motion against a junior representative suggesting the junior was incompetent. The senior representative withdrew the motion before the junior was able to respond to the allegations. Fortunately, the judge saw through the sharp practice of the senior representative's attempt to intimidate the junior representative with the motion. Any concerns about possible tension with other representatives should be disclosed to the client.

Communication Is Key

Understanding what the client wants includes finding out the client's "big picture," and this is where advance preparation becomes essential. Simply knowing the client's position on any particular issue will not be enough. Fisher and Ury's method of principled negotiation is designed to produce wise outcomes efficiently and amicably by focusing on interests and not positions.[6] To do this, the legal representative must ensure that the client has given all necessary particulars relating to the negotiation. Depending on the client, the representative may need to carefully extract important information by asking open-ended questions that require the client to answer in their own words, going over details and analyzing possible options and bargaining issues that may arise. Not all clients have the experience to understand what information is important for the legal representative to know. As a result, this may mean spending more time preparing with the client than in direct negotiation with the other parties. In fact, in his book *Smart Negotiating*, James C Freund admits that he actually spends more time in caucus with his clients than in jousting with the other side.[7] By taking the time to thoroughly understand the situation and the clients' perspective, the legal representative will obtain a better understanding of what is important to their client and ultimately be better able to negotiate to their true interests.

Use Caution When Offering Advice

In some cases, the client may want the legal representative to offer an expert opinion, advice, or a direction to take in the negotiation or mediation. In fact, this may be the reason why a particular legal representative was hired in the first place. This is not uncommon when the representative has a great deal of knowledge and experience that may benefit the client. When these situations arise, representatives should use careful language that the client can understand so that they can make reasoned judgments on a negotiating strategy.[8] Avoid using any legal jargon and focus on plain language to ensure the client has a clear understanding of their options. Awareness of the audience the representative is addressing is key and communicating with the client appropriately based on the age, culture, gender, and background of the client. Representatives must never forget that their client is in the driver's seat and that the client must live with any decision in the long term. Being in that driver's seat means that clients ultimately make the decision as to whether to follow any particular recommendation the representative might make. Clients are personally tied to the legal issue, so their overall outlook and risk analysis may be different than that of the legal representative.

Legal representatives should still be cautious in offering any opinion on matters in which they are not experts. A representative that finds themselves in this situation, would be better recommending a specialist who can provide the necessary details, information, and overall outlook on the matter. The other parties may then be willing to rely on this opinion in the negotiation because it appears to be a more objective position. Recall from Chapter 5 that objective criteria is a basic element of negotiation and one of the four cornerstones of Fisher and Ury's method of principled negotiation.[9]

Keep in mind that the nature of litigation is such that there will always be one party that loses at trial. This does create an additional risk to the legal representative, who can become a scapegoat for an unhappy client that loses at trial. It is important for the representative to protect themselves by making a clear assessment of ADR options and communicating those risks of going to trial. These assessments can limit potential blame and complaints by the client to a law society.

Irrespective of the experience and knowledge of the client and the opinions of the legal representative, the representative should feel comfortable adding their own ideas or feelings, as long as it is done in the best interest of the client. The representative's personal agenda should not be a factor or influence in representing the client.

Be Clear About What Role You Will Each Play in ADR

Every client's level of participation in ADR will vary dramatically. In some cases, the client will play a direct role; in others, the client may have a low level of participation. Therefore, in advance of the ADR session, the legal representative needs to determine the client's expected level of participation. The client may want to handle certain parts of the negotiation or may decide to have everything go through their legal representative. Whether requested by the client or not, the legal representative should have an understanding of the direction the client wants to take. This means being clear about the role that the representative is expected to play. It may very well depend largely on the knowledge and experience (or lack thereof) of the client. For example, an assertive client may choose to actively participate in the negotiations by brainstorming, developing options, and considering criteria in a mediation. Another client may not

6 R Fisher & W Ury, *Getting to Yes, Negotiating Without Giving In* (New York: Penguin, 1991) at 10

8 *Ibid.*

9 *Supra* note 6.

participate actively as a result of their age, gender, personality, or culture. For example, someone who is extremely anxious or shy may not feel comfortable vocalizing their position and interests in any negotiation or mediation.

CHECKLIST: ADR CONSIDERATIONS WHEN PARTICIPATING IN AN ADMINISTRATIVE TRIBUNAL AND/OR COURT ACTION

- ☑ Which court or tribunal is applicable to the client matter?
- ☑ Which rules of procedure or statute sets out the procedures for that particular court or tribunal?
- ☑ What are the ADR obligations of that particular court or tribunal as set out in its procedural rules?
- ☑ Is the ADR obligation mandatory or voluntary?
- ☑ What exactly are the ADR obligations of the legal representative with regard to filing documents and time limits during the litigation process?
- ☑ Who conducts the mediation? Is the mediator assigned or selected by the parties? Is the mediator selected from a special court or tribunal roster?
- ☑ Who schedules the mediation?
- ☑ Does the mediation take place immediately before the hearing/trial or well in advance and prior to being set down for trial/hearing?
- ☑ Who pays for the mediation?
- ☑ Is there disclosure of documents prior to the mediation or any rules about the exchange of documents?
- ☑ Who is required to attend the mediation? Do all parties in attendance have the proper authorization to settle?
- ☑ Is there further filing of ADR documents prior to the mediation, such as a statement of issues?
- ☑ Is there a prescribed mediation format?
- ☑ If a settlement is reached, what are the filing requirements?

Other Factors in ADR

Ethics

It is important to note that in any communication between the client and the egal representative where there is a potential ethical issue involved, the legal representative should never hesitate to express their views. This is especially the case when the client may be suggesting an unethical course of action that may put the representative in breach of the applicable law society's rules of conduct. Any opposition should be voiced clearly and succinctly by the legal representative. For example, the client may instruct the representative not to disclose certain aspects of the client's financial situation. This would not be a problem unless the financial status of the client is directly relevant to the legal issues at hand. The legal representative may not want to breach any duty of client confidentiality by disclosing this information when instructed not to; however, the legal representative may have concerns that not disclosing this relevant information may amount to misrepresentation and possible breach of their duty of honesty and duty to the administration of justice. The legal representative may need to consider withdrawing from the retainer with the client in the event the client's instructions put them at risk of breaching the rules of conduct. In some cases, the representative may need to seek out legal advice from senior colleagues or associates, or even retain outside counsel to assist in responding to an ethical issue.

Culture and Gender

Understanding the ADR process would not be complete without looking at how culture and gender may affect ADR. For example, research of different cultures in the course of negotiation suggests that it may be a significant predictor of negotiation style and strategy selection. Cultures can influence the way people communicate, how they take risks, and the dynamics of relationships between parties. The difficulty is that we often do not recognize our own culture because we usually equate it with what we understand as common sense.

It is not surprising that culture can influence the outcome of negotiations in a variety of ways. To facilitate a successful negotiation, the legal representative must understand how these cultural differences manifest themselves. As discussed above, much of the negotiation depends on information gathering, exploring issues and options, identifying the client's underlying interests, and predicting the interests and options of the opponents. This puts a significant amount of pressure on the legal representative to extract as much information from the client as possible. The client may be of a particular gender or culture, and therefore awareness and sensitivity to those differences are crucial to success.

Communication has often been identified as the essence of negotiation. As "[c]ultures influence the way that people communicate, both verbally and nonverbally,"[10] it will be necessary for clients to take time during the negotiation process to recognize these differences. Additionally, as noted by Kolb, gender often affects how we are socialized to communicate:

> [T]he female pattern of communication invo.ves deference, rational thinking in argument, and indirection. The male pattern of communication typically involves linear or legalistic argument, depersonalization, and a more directional style. While women speak with more qualifiers to show flexibility and an opportunity for discussion, men use confident, self-enhancing terms.[11]

Given the above, the legal representative will need to consider probing more deeply with certain cultures and/or genders when trying to extract those underlying interests. This may mean "separating the people from the problem" as Fisher and Ury describe in *Getting to Yes*.[12] Relationships often tend to be tangled up with problems as emotions are expressed and perceptions become lost. Fisher and Ury recommend discussing both parties' perceptions, listening actively, and speaking with a purpose by focusing on the substance of the problem.[13]

10 RJ Lewicki et al, "Negotiation" in J Macfarlane, *Dispute Resolution: Readings and Case Studies*, 2nd ed (Toronto: Emond Montgomery, 2003) at 206.

11 D Kolb, "Her Place at the Table" in Macfarlane, *ibid* at 200.

12 *Supra* note 6.

13 *Ibid* at 36.

Cultures also vary significantly in the way people are willing to take risks.

> Some cultures produce quite bureaucratic, conservative decision makers who want a great deal of information before making decisions. Other cultures produce negotiators who are more entrepreneurial and who are willing to act and take risks when they have incomplete information.[14]

While the legal representative will likely already have instructions from the client for the negotiation, it will be important for the representative to have a sense of what that client's risk propensity is—for example, whether the client would be more willing to move early on a deal and take chances, or seek further information before agreeing.

There is a great deal of literature that acknowledges the broad range of cultural norms and styles that exist within negotiations. Treating clients according to certain stereotypes can be condescending and insulting. However, a successful negotiation will rely on the sensitivity and awareness of those cultural differences so they can be taken into account in a way that will lead to an effective and satisfactory outcome for the client.

Similarly, culture can have a significant impact on negotiations. By keeping an awareness and understanding of the impact of culture, the legal representative can ensure that any cultural influences do not negatively impact the negotiation.

RECURRING CASE STUDY

Comparing ADR Outcomes

To summarize, three different dispute resolution processes were attempted in an effort to resolve the dispute between Angela and her landlords Leo and Mary with regard to Angela's damaged figure skates.

Discussion of Scenario

- *Negotiation*: The attempts by Angela and Mary to negotiate a settlement in Chapter 5 broke down after accusations were made, the parties became emotional and threats were made to take the matter to court. The parties may have had more success with negotiation once they retained legal representatives in Chapter 6, but one of the paralegals was not properly prepared and appeared to be in violation of the *Paralegal Rules of Conduct*.[15]
- *Mediation*: Community mediation may have achieved a settlement in Chapter 7, but Mary did not feel as though she had the authority to settle the matter without consulting with Leo. Having a legal representative and support person for Angela in Chapter 8 seemed to balance the power dynamics and allowed the parties to resolve the damages and maintain the landlord–tenant relationship.
- *Arbitration*: When the matter progressed to arbitration in Chapters 9 and 10, the issues were resolved, but at an additional cost and not in a way that allowed the parties to maintain their landlord–tenant relationship.

14 Lewicki, *supra* note 10 at 207.

CHAPTER SUMMARY

The majority of legal matters will be settled outside of the courtroom using some form of ADR. The legal representative, must carefully consider which form of ADR is most appropriate and best suited to a particular legal action. The most common forms of ADR are those that you have learned about so far—negotiation, mediation, and arbitration.

In choosing an ADR process, representatives should consider a number of factors, including the nature of the litigation and the type of legal issue, the relationships between the parties, and whether the parties have privacy concerns that would make the open litigation process less than ideal. During this process, the representative should understand the client's needs and interests—including their culture and gender—and ensure that the client is as informed about and involved in the process as they expect to be.

KEY TERMS

quantum of damages, **273**

settlement privilege, **268**

REVIEW QUESTIONS

1. Define and distinguish between the different types of ADR processes.
2. Which dispute resolution method allows parties to remain in control of the procedure and process?
3. In choosing the best ADR process for the client, discuss each consideration that should be made.
4. Larry Brown, a paralegal, was attending at a mediation with his client, a small auto mechanic shop called A1 Mechanics. The shop was involved in a dispute with a large manufacturing company, Magfa, that supplied most of the automobile parts for the mechanic shop. A1 Mechanics was suing the manufacturer for breach of contract. The manufacturer is a large company. The manufacturer is known to often bargain in bad faith and take extreme positions. It was also known to send employees as representatives for the company that do not have the authority to enter into any settlement agreement. Both tactics aim at intentionally raising the legal costs for the plaintiff. In this scenario, what should Larry recommend that his client do?
5. At what point in the litigation process does a mediation typically take place?
6. James and Ellen have a dispute involving a contract. James contractually agreed to buy Ellen's car for $5,000. Ellen delivered the car to James, but he refuses to pay. Ellen suggests that she and James sit down and that they attempt to resolve their dispute with a third party who might be able to help them. If they don't resolve the dispute, she feels she could still head to court after that. Which of the following is Ellen suggesting that she and James do?
   a. Arbitrate their dispute.
   b. Conduct an informal mini-trial.
   c. Negotiate their dispute.
   d. Take part in a mediation.
7. Jane was involved in a dispute with her neighbour Charles. Charles had built an incredible tree house in his backyard for his children. The problem is that the tree house is so big that it affects Jane's privacy because it overlooks her property and backyard. She wants to make a complaint to the city, but recognizes that she has to live next to Charles for many years to come. However, this situation is really bothering her and she is concerned about what Charles will add to the tree house next. Mediation has been suggested as a way to resolve this dispute. Jane would like to know more about mediation. Discuss why mediation would be an important method to resolve the dispute for Jane.
8. When Sarah Bishop went to work for Aztec Pharmaceutical Company as a senior researcher, she signed an employment contract that precluded her from working for another pharmaceutical company for five years after her employment with Aztec terminated. After working for Aztec for three years, Sarah was lured away by another pharmaceutical company. Sarah claims that the contract she signed was unreasonable and therefore unenforceable. Aztec claims that the contract is a standard industry clause and is enforceable. Sarah meets with Paul Meyer, a paralegal. He is bound by the *Paralegal Rules of Conduct*[16] to discuss whether mediation would be an appropriate method of dispute resolution. Discuss five advantages of mediation as a form of a dispute resolution process.

9. Discuss the impact of culture and gender in ADR. Discuss what the paralegal can do to reduce the possible negative impacts of culture and gender on ADR.
10. What form of ADR is has an award that is binding on the parties?
    a. Arbitration.
    b. Mediation.
    c. Litigation.
    d. Negotiation.
11. What form of a legal resolution takes place in a public forum?
    a. Arbitration.
    b. Mediation.
    c. Litigation.
    d. Negotiation.
12. What form of ADR does not have third-party intervention?
    a. Arbitration.
    b. Mediation.
    c. Litigation.
    d. Negotiation.

EXERCISE

1. Negotiation and Mediation Role Play: Brown's Power Washing v Homeowner Chin (see Appendix A)

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Appendix A Role Play: Brown's Power Washing v Homeowner Chin Negotiation and Mediation

Type: Negotiation and Mediation

Participants: Two paralegals for the negotiation; two paralegals and one mediator for the mediation

Level of Difficulty: Introductory

Time: Set aside approximately 30 to 40 minutes for this activity, including 5 minutes to read, 20 minutes for the negotiation, and 5 to 10 minutes for the debrief.

Objectives

- Introduce positions, interests, brainstorming, objective criteria, and options as part of the negotiation.
- Break down the negotiation process by conducting the negotiation in a step-by-step format.

Procedure

- Divide the students into groups of two to complete the negotiation first. After the negotiation, divide the students into new groups of three to complete a mediation.
- Assign a role to each student and have students read their roles.
- The paralegals should complete the ADR Worksheet for Negotiation and Mediation (Paralegal).
- Begin negotiation:
  1. 2 minutes: Students introduce each other and engage in small talk and develop a rapport with the opposing representative.
  2. 5 minutes: Begin a discussion of interests. Students should not negotiate an agreement during this stage. Gather information by asking questions and using active listening skills.
  3. 10 minutes: Conduct brainstorming together on a separate sheet of paper.
  4. 5 minutes: Discuss options using objective criteria
  5. 5 minutes: Negotiate a potential agreement.
- After the negotiation, complete a mediation.
  1. Switch up the students and divide the students into groups of three. Assign them roles as paralegal or mediator. The mediator should complete the ADR Worksheet for Mediation (Mediator).
  2. Conduct the mediation with the group using similar steps above but with a mediator.

Debriefing with Students

- Ask students to share their settlement agreements.
- Discuss how the role play was different when completed as a negotiation or a mediation.
- Discuss the benefits and consequences of negotiating and mediating this dispute.

Brown's Power Washing v Homeowner Chin

Confidential Instructions for Paralegal of Reggie Brown of Brown's Power Washing

You are a successful paralegal working for a small firm called Khan Paralegal Services. You were recently contacted by Reggie Brown about a dispute involving his business Brown's Power Washing.

Brown's Power Washing is a contractor that provides a service of power washing for customers on just about anything including decks, vehicles, buildings, fencing, items, etc. Brown's is a fairly new business and has relied on word of mouth to generate new leads for his business. He has a website for his business and Google reviews are critical in establishing some credibility for this business. He usually asks his satisfied customers to complete a Google review after he has completed the job.

Brown's was hired over the phone by Mr and Mrs Chin to power wash the patio stone around the pool in the Chin's backyard. They sent some pictures of the patio stone so Brown could quote the job. The Chins are excited to have their patio cleaned. They recently built a new deck in their backyard, and there was dirt and debris dragged through the backyard near their pool. Usually, the pools are empty or covered when Brown has done the spring power washing for other pool patios. Brown expressed concern to the Chins that the pool was already filled and did not have a cover. He mentioned that it would be impossible to prevent backwashed water from entering the pool. The Chins waived this off and decided to proceed anyway. They had a good pool vacuum that they felt would be able to deal with it. They were eager to get it done as all the other contractors were busy.

Brown hired two students to help with the power washing on the Chin's patio. Brown was on another job in the morning and sent the students to start the power washing at the Chin's, a job that he thought was straightforward. By the time Brown arrived, he noticed that the pool water was brown. Unfortunately, there

was significant mud and debris on the patio stones that was not shown in the pictures. Brown was surprised to see a new deck was built on the premises. The original pictures sent by the Chins did not show how much dirt and debris had been left as a result of the deck construction. Brown completed the job to the best of his ability and billed the clients for $1,800.

The Chins were furious with the water and debris in the pool. A week later, the pool filter was clogged and broke down. It was going to cost $1,200 to replace it and it was not going to be replaced for another two months, well after the pool birthday party they were planning for next month. The Chins refused to pay Brown's invoice.

Brown wants to get paid for his work. He decided to sue the Chins in small claims court.

As Brown's paralegal you agree to try to resolve this matter through negotiation or mediation.

Confidential Instructions for Paralegal of Homeowners Mr and Mrs Chin

You are a successful paralegal working for a small firm called Khan Paralegal Services. You were recently contacted by Mr and Mrs Chin about a dispute involving the power washing around their pool. They have been sued by Brown's Power Washing for $1,600 for payment of work that was completed.

The Chins contacted Brown's Power Washing, a new contractor, to clean the decking around their pool. They noticed that Brown's did not seem to have many Google reviews and they wondered if it was a new business. Unfortunately, all the other companies were busy and would not be available for at least two months, well after the birthday pool party they were planning. The Chins recently had a new deck built in their yard and want to complete the yard so it can be ready to use in time for the pool party.

Mr and Mrs Chin hired Brown's over the phone. They thought it was strange that Brown's did not come by to quote the job and see it in person. Brown asked them to send over some pictures, which they did with Mrs Chin's cell phone, which did not have a good camera. The Chin's are excited to have their patio cleaned. They recently built a new deck in their backyard, and there was dirt and debris dragged through the backyard near their pool. Brown expressed concern to the Chins that the pool was already filled and did not have a cover. However, the Chins needed it done in time for the party. Brown mentioned that some backwater may wash in to the pool, but it was not something a good filter and vacuum couldn't fix.

On the day of the job, the Chins were out of town. When they returned the next day, they noticed the pool was completely brown! By the end of the week, they noticed that the pool filter had stopped working. The Chins were furious with the water and debris in the pool. A week later, the pool filter was clogged and broke down. It was a very old filter and simply could not handle the added mud. It was going to cost $1,200 to replace it and it was not going to be replaced for another two months, well after the pool birthday party they were planning for next month. The Chins refused to pay Brown's invoice. They also had to empty the pool, have it cleaned and put in new water in the pool. It has been a huge cost and inconvenience.

Around six months later, the Chins were served with a small claims court lawsuit. They have defended the claim.

As the Chin's paralegal you agree to try to resolve this matter through negotiation or mediation.

ADR Worksheet for Negotiation and Mediation*
Brown's Power Washing v Homeowner Chin: Party

Your Client's Position ~ What am I seeking?

1. _____

Your Client's Interests ~ Why am I seeking what I am seeking? What I really care about (i.e., my wants, needs, concerns, hopes and fears).

1. _____
2. _____
3. _____
4. _____

Opposing Parties' Positions ~ Based on the information provided, what do I think they are seeking? What are their positions?

1. _____

Opposing Parties' Interests ~ Why are they seeking what they are seeking? What I think they really care about (i.e., their wants, concerns, hopes and fears).

1. _____
2. _____
3. _____
4. _____

Options ~ Possible agreements that we might reach.

1. _____
2. _____
3. _____
4. _____
5. _____

Objective Criteria/Legitimacy/ Proof ~ External standards or precedents that will help the parties to assess any options (e.g., market value, precedents, scientific judgment, professional standards, costs, what a court might decide, moral standards, expert opinions, equal treatment, or tradition). *Be specific to the scenario.*

1. _____
2. _____

BATNA (Walk Away Alternative) ~ What can I do if I walk away without agreement? What is my back up plan? What is my next step?

1. _____
2. _____
3. _____

*Adapted from R. Fisher & D. Ertel, *Getting Ready to Negotiate: The Getting to Yes Workbook* (New York: Penguin, 1995).

ADR Worksheet for Mediation
Brown's Power Washing v Homeowner Chin: Mediator

Parties' Positions – Based on the information provided, what do I think they are seeking? What are their positions? Please identify who is Party A, B.

Party A _____

Party B _____

Opposing Parties' Interests – Why are they seeking what they are seeking? What I think they really care about – i.e., their wants, concerns, hopes and fears).

Party A

1 _____

2 _____

Party B

1 _____

2 _____

Speaking Sequence

Who will you ask to speak first? Why?

1 _____

Appropriateness of Mediation

Why do you think mediation will be an appropriate way to deal with this dispute?

1. _____

Obstacle to Settlement

What do you anticipate will be the greatest obstacle to achieving a win–win settlement?

1 _____

Selected Topics in ADR 12

Learning Outcomes

After reading this chapter, you will be able to:

- Recognize why Indigenous peoples do not regard our court system as an appropriate mechanism for dealing with disputes.
- Identify how Indigenous dispute resolution can be used alongside the courts and traditional ADR processes.
- Understand the use of ADR processes within the administrative tribunal process.
- Recognize the application of ADR processes within the Human Rights Tribunal of Ontario and the Landlord and Tenant Board.
- Understand the theoretical concept of online dispute resolution (ODR).
- Appreciate the connections between ODR, traditional ADR processes and the courts.
- Understand the requirements and obligations and duties required as a mediator and legal representative.
- Identify the steps required for the designation as a certified or qualified mediator and arbitrator in Canada.

Introduction

The field of alternative dispute resolution (ADR) is intended to offer a potential solution to many of the common barriers that are present when seeking justice. Opportunities to use ADR are continually growing as more people embrace a collaborative approach to resolving disputes. The past successes of ADR have laid the groundwork for unlimited opportunities to expand its use. Some of the practices that we use today in ADR parallel the processes that have historically been used by Indigenous peoples. This chapter will highlight reasons why the traditional court system has not been accepted by Indigenous communities and will provide a discussion of the circle process used in Indigenous dispute resolution. Additionally, since administrative tribunals have embraced ADR for many years, an overview of the different dispute resolution processes currently being used at two Ontario tribunals will be provided in this chapter. Turning our attention towards opportunities for expansion, online dispute resolution (ODR) will be discussed in anticipation of a widespread movement towards using technology to further increase access to justice. Finally, given the ever-growing opportunities in the alternative dispute resolution field, a number of training opportunities to become an ADR practitioner will be discussed.

Indigenous Dispute Resolution

Indigenous Law

Prior to the arrival of European settlers, Indigenous peoples had developed societal and political systems that included their own laws and customs. Despite what had already been established, the settlers imposed their systems of laws and government upon these Indigenous communities. Throughout time, and in an effort to maintain their own ideals, there has been continued resistance from Indigenous peoples to assimilate into the rights-based common law approach used by the Canadian justice system.

The basis of Indigenous law is explained by the following excerpt from the Indigenous Law Research Unit at the Faculty of Law, University of Victoria:

> [W]ith the absence of courts and written texts, the expression of Indigenous law is not the same as Canadian law. Instead, Indigenous law can be found in stories and in the interactions between people and their environment as they respond to harm, injuries, and disputes. For example, within these responses Cree law is expressed in principles, procedures, obligations, and rights that communities have used, upheld, and passed on for thousands of years. This was not just about obeying certain individuals or following certain rules. It was about people thinking through principles and acting on their obligations together. This still goes on today in different ways.
>
> We believe that Indigenous laws and their approaches to problem solving, making decisions, creating safety, and maintaining or repairing relationships are still capable of thriving and serving the needs of communities. This belief is held despite historical efforts to minimize the role of Indigenous laws in communities and its treatment as something other than law.[1]

1 H Friedland, J Asch & V Napoleon, "A Toolkit for On-Reserve Matrimonial Real Property Dispute Resolution" (2015) at 46-47, online (pdf): *University of Victoria* <https://dspace.library.uvic.ca/handle/1828/12637>.

Indigenous law is not focused on punishment and compensation. Instead, it has an emphasis on discussions and interactions in order to work through issues and repair communities. Given the fundamental differences in the ideological framework between Indigenous law and the common law, it is not surprising that there has been an ongoing reluctance from Indigenous peoples to partake in the traditional Canadian court system.

Indigenous Peoples and the Courts

Our current legal system does not do enough to demonstrate respect for the laws and processes of Indigenous peoples. The Canadian court system stresses the importance of winning a dispute and neglects the human cost associated with losing. This cost of losing is inconsistent with the Indigenous peoples' values and their histories, cultures, customs, and laws.

There are numerous additional factors that have led to a reluctance and disinterest of Indigenous peoples to utilize our legal system as a mechanism for resolving disputes. One such reason is that Indigenous communities favour a more comprehensive approach that provides a role for extended family, kinship groups, or community members in the decision-making process. They do not accept the concept of one appointed individual, in the position of authority, to make the determination of what is best for all.

Further, there is resistance to participate in the court system because Indigenous legal traditions and languages have not been integrated into the court processes or decision-making techniques. Judges are usually from outside the community and may not have a proper appreciation of community dynamics, including traditions, language, and laws. Past negative encounters with the justice system and the reliance upon external decision-makers have further elevated the distrust of the overall system.

Under Indigenous law, the participants have a say in the process and resolution, but they have very little input in the court system. The adversarial nature of the court, the reliance upon legal representatives and the strict rules of procedure all formalize the court process. By contrast, Indigenous law strives to create a more inclusive environment that has some structure, yet much more informal than court. Indigenous law is more about levels of respect and responsibility and less about control and dominance. The logistics of the court system are overly complicated, time-consuming and expensive. The courts are often back-logged with significant delay in having matters resolved. The preferred approach for Indigenous peoples is to resolve matters efficiently and within their own communities.[2]

In Canada, Indigenous peoples and the government have different ideals in terms of settling land claims and treaty issues. Despite the fact that Indigenous peoples have continually sought a better legal mechanism in settling these disputes, the courts have been the primary legal tool. Further, the two sides do not have a shared vision: the Crown negotiators regard the treaty agreements as a simple real estate transaction, whereas Indigenous peoples interpret the treaty agreements in a much deeper and holistic context—as a land sharing mechanism. Frustration amongst Indigenous peoples is unavoidable because the court system is not their preferred resolution

2 *Ibid* at 10.

process and because the system does not demonstrate the same respect for how they believe the land should be regarded.

And finally, the court system seems to be fixated on punishment and compensation. It does not attempt to nurture or strengthen the community in the way that Indigenous law does. As summarized by Former National Chief George Erasmus,

> Litigation is no way to build a community! It is not the way preferred by Aboriginal peoples. We have a history of treaty-making that stretches back long before Columbus…For Aboriginal peoples, treaties created a relationship of mutual trust that was sacred and enduring. The bond created was like that of brothers who might have different gifts and follow different paths, but who could be counted on to render assistance to one another in times of need.[3]

Indigenous Dispute Resolution

Indigenous dispute resolution (IDR) *processes that have been used by Indigenous communities to deal with conflict*

ADR seems to follow the many of the fundamental principles that are used in **Indigenous dispute resolution (IDR)**. Both ADR and IDR are based on the same foundational concept that discussion and collaboration can improve relationships and provide closure for a range of issues. And both ADR and IDR strive for a more inclusive process, with active participation from participants. While IDR uses aspects of negotiation, mediation, and arbitration, it goes beyond what these ADR processes have to offer. A common IDR process that seems to mirror the guiding principles of ADR is the use of circles. Circles can take a number of forms, but they are all based on the fundamental ideas that the community shares a role in the resolution of disputes and that it is not necessary to involve the courts.

Circle Processes

circle processes *a form of IDR that brings community members together to discuss and resolve conflict*

Circle processes are commonly used in Indigenous communities as a mechanism for building peace and settling disputes. The circle itself symbolizes the interconnected community. As a form of IDR, circles provide a safe space for participants to gather and share stories in an effort to reach resolution. Community members are invited to a circle in order to engage in a healing process to restore balance to an individual and to the community. Typically, circles are run by a trained facilitator who has specialized knowledge about the community's history and principles (e.g., legal, cultural, and spiritual beliefs). In many cases, the participants extend beyond the initial parties and often include others who have an interest in the dispute (e.g., family members, community members, and professionals). An overview of the circle process is provided below.

3 Georges Erasmus's speech at the 3rd LaFontaine

OVERVIEW OF THE CIRCLE PROCESS

1. Referral to the Circle: Similar to a typical ADR process, the referral to the community circle process comes from the courts, the government social services, or in some cases, from the community itself, and after the referral process, the preparation of the circle ensues.
2. Preparation for the Circle: The facilitator talks privately with potential participants. They can also consult with important and notable members of the community, Elders, and other professionals to enlist their opinion or support.
3. The Opening of the Circle: The opening of the circle commences with a brief Indigenous ceremony held by a spiritual leader or a community Elder, after which the ceremony proceeds to the clear establishment of the rules and expectations for the circle stage.
4. Identifying the Parts of the Circle: The circle typically involves a round of introductions; everyone presents their role and reason for participating.
5. The Issue before the Circle: The facilitator will invite participants to share their opinions, feelings, and views on the issue facing the circle. The format of the process is not rigidly structured; however, it is mediated and guided by the facilitator to ensure a smooth flow. During the process, the participants create a knowledge base about the possible cause, priorities, interests, and hopes for the successful resolution of the issue.
6. The Learning Purpose of the Circle: All circles inevitably carry an educational component. The role of the community leaders, spiritual leaders, Elders, or respected people is crucial as they can offer guidance or ways out of the problem (based on personal experience). In circles that involve trained and educated professionals, there could be referrals to other government resources and social service organizations. The goal behind the education with a wide variety of experts and notable people is an approach to try to combine Indigenous traditional knowledge and wisdom with Western scientific methods.
7. Development of a Plan: The participants of the circle design a final agreement or a proposed plan for resolution.
8. The Final Outcome of the Circle: The facilitator then decides to approve, revise, or suggest modifications to ensure the viability of the plan and its chance for success.
9. The Closing of the Circle: If the plan is successfully approved, the circle comes to an end. A final brief ceremony may be conducted by a spiritual leader or an Elder.
10. Follow-up or the Return to the Circle: The facilitator can schedule follow-up sessions to monitor the implementation of the agreement, adjustments, or in some cases, small celebratory ceremonies to mark the successful conclusion of the circle.

Source: Adapted from H Friedland, J Asch & V Napoleon, "A Toolkit for On-Reserve Matrimonial Real Property Dispute Resolution" (2015) at 35-36, online (pdf): *University of Victoria* <https://dspace.library.uvic.ca/handle/1828/12637>.

The circle process is used throughout Indigenous communities and can take on many different formats in order to serve a variety of purposes. Ball, Caldwell, and Pranis summarize the different type of circles as follows:

- Circles of Understanding: Used to clarify a specific issue (but not for decision-making purposes).
- Support Circles: Used to bring key people together to offer support to someone who is experiencing difficulties or personal issues.
- Healing Circles: Used to share pain and experiences after a member (or members) of the community have experienced loss or trauma.
- Celebration or Honouring Circles: Used to bring people together to share an accomplishment and express gratitude.
- Group Decision-Making Circles: Used to build consensus amongst a group of community members in order to come to a decision.
- Conflict Resolution Circles: Used to bring disputing parties together to resolve their differences.
- Youth Development Circles: Used specifically to support youth and give them a voice.
- Sentencing Circles: Used to bring people together who have been impacted by an offence; a restorative justice process that works alongside the criminal justice system.
- Reintegration Circles: Used to support people through significant life changes (e.g., re-entering the community after release from prison).
- Community-Building Circles: Used to create bonds and relationships among a group of people with shared interests.[4]

Although a cursory review of the Indigenous circle process may appear to be very similar to a traditional ADR process, key distinctions do exist. Most ADR processes tailor their methods and strategies to suit the *individual needs* of the participants in the process. By contrast, IDR starts from the premise that *community needs* are more important in the process than the individual's needs. IDR believes that the balance disrupted by an individual requires the help and support of the community in order to bring about change. Ultimately, the community will assess, evaluate, assist, and finally help resolve the issue.

Another fundamental difference is the manner in which culture and knowledge is interwoven into IDR. Indigenous knowledge and traditional experience are integrated into the process itself, thereby making it less institutionalized than an ADR process. IDR models favour cultural teachings and wisdom over the objective criteria, scientific facts, and evidence that are typically used in ADR processes. As one Indigenous scholar points out,

> [ADR practitioners] *listen to a story and try to discern a scientific fact, rather than personal, spiritual or emotional connection.... There is little room at many negotiation tables for spirituality, emotion, or experience that is not also supported by scientific facts.*[5]

4 J Ball, W Caldwell & K Pranis, *Doing Democracy with Circles* (Minnesota: Living Justice Press, 2010) at 56-61.

5 W Victor, "Alternative Dispute Resolution (ADR) in Aboriginal Contexts: A Critical Review," Canadian Human Rights Commission (April 2007) at 27, online (pdf): *Government of Canada* <https://publications.gc.ca/collections/collection_2008/chrc-ccdp/HR21-75-2007E.pdf>

Administrative Tribunals and ADR

The Application of Administrative Law

Going to court is not the only place where disputes are resolved. Administrative tribunals are like court in that they both have a decision-maker who makes decisions that affect individuals. The area of law that developed from disputes about how our laws affect individuals, including citizens and businesses is called **administrative law**. Our federal and provincial governments make many important decisions that affect our daily lives, such as whether someone is entitled to disability benefits or whether a restaurant can serve liquor. Some decisions have serious implications such as whether someone might be deported from Canada, whether a paralegal or lawyer might lose their license to practise law, or whether a criminal might be granted parole from prison. If that individual or business disagrees with that decision, they may be able to appeal the decision and have it ultimately decided by an administrative tribunal. A tribunal is a type of administrative government **agency** that has been assigned governance powers under specific legislation to resolve these types of disputes.

administrative law
a type of law that developed from disputes about how our laws affect individuals, including citizens and businesses

agency
any person, institution, body, board, or tribunal assigned governance powers under legislation

While tribunals fall outside of the judicial branch and our regular court systems, they have a **quasi-judicial function** wherein they function in a "court-like" manner. Administrative tribunals make thousands of decisions every year that affect the lives of regular citizens, groups, and businesses. Tribunals can provide a quicker, less costly, and more accessible alternative than the courts. Parties before a tribunal can be self-represented or they have a right to be represented by a lawyer, and, in some jurisdictions like Ontario, a paralegal. In fact, many of the disputants who go before an administrative tribunal are self-represented. As a result, administrative tribunals tend to be more informal than courts and their procedural rules allow tribunals to be more flexible with how disputes are resolved including the ways of hearing a case. Tribunals do not have judges, but they do have decision-makers, called members or **adjudicators**, that have specialized knowledge and expertise in a particular area of governance and law over that dispute. These adjudicators can resolve disputes in different ways, including making a decision following an oral, written, or virtual hearing or helping the parties to achieve a mutually agreeable settlement through a form of ADR such as mediation. Each tribunal is entitled to make its own rules of procedure about how conflicts may be resolved. That includes procedures about ADR, such as the types of ADR available to the parties like mediation and arbitration, whether that ADR process is mandatory or voluntary, and who would preside as the third-party dispute resolver.

quasi-judicial function
proceedings and functions that appear judicial but are conducted by a person that is not a judge or acting in a judicial capacity but resemble those of a court or judge

adjudicator
a person who presides, judges, or arbitrates during a formal dispute

PRACTICE TIP

A legal representative appearing before a particular tribunal must be knowledgeable about that tribunal's rules. They should be sure to check the following sources for procedures of that tribunal as they are changed more frequently than the rules of a court. Some changes are advised through notices such as a practice direction and must be followed:

1. Enabling statute for that tribunal

2. Statute of general application (e.g., *Statutory Powers and Procedures Act* in Ontario)[6]
3. Rules of procedure
4. Practice directions
5. Guidelines

Using ADR in Administrative Tribunals

Resolving complaints and disputes through an administrative tribunal is an efficient alternative to court. However, it is important for the legal representative to determine if a hearing is the best option for resolution. There are many factors that must be considered, such as the length of time it may take to have a full hearing and the legal costs to proceed, as well as the fact that a tribunal decision is in the hands of the adjudicator, is out of the party's control, and is limited to the remedies that the tribunal must follow. There are other considerations, including how the relationship between the parties will be affected once the dispute gets to the level of a tribunal hearing. Most tribunals offer several alternatives to a tribunal hearing for resolving a dispute. In fact, many tribunal adjudicators encourage the parties to try to settle the dispute before having a hearing. The types of alternatives will depend on what options are available to a disputant in that particular tribunal and at that stage of the dispute.

Prior to engaging the tribunal process, the parties may use negotiation or mediation to resolve a dispute early on. They can be used to resolve many different types of administrative law disputes including human rights, landlord and tenant disputes, land use, wrongful dismissal, and more. Negotiation is a good place for the disputants to start in an attempt to resolve a dispute involving administrative law. Negotiation is a quick, easy, inexpensive, and potentially satisfying way of resolving the dispute, as the parties can control the outcome. Mediation can also be used effectively prior to the tribunal process by saving time, money, emotional stress, and salvaging relationships through the earlier resolution of the dispute.

Early resolution before the tribunal process is engaged may not always be possible due to the nature of the dispute and the appeal route required when challenging a particular administrative or government body involved in the dispute. Much will depend on whether the party has brought an application before a tribunal or board (e.g., the Human Rights Tribunal of Ontario or the Landlord and Tenant Board) or is appealing a decision made by a government agency (e.g., the Social Benefits Tribunal or the Immigration and Refugee Board of Canada). When going through the tribunal process, a tribunal may impose mediation or offer it voluntarily to the disputants. The disputants may be able to choose their own mediator or may be assigned a mediator who is a tribunal staff person or a tribunal member. Where the parties are not able to resolve the dispute following the mediation, in some tribunals, the mediator changes roles, adjudicates the dispute, and imposes a decision.

The important thing to remember is that each tribunal makes its own rules of procedure, including what type of ADR processes it offers. The following sections will set out the ADR processes involved in two separate tribunals, the Human Rights Tribunal of Ontario and the Landlord and Tenant Board.

Human Rights Tribunal of Ontario ADR Procedures

The Human Rights Tribunal of Ontario (HRTO) is a provincial administrative tribunal that resolves disputes about human rights between individuals, businesses, or government institutions. The HRTO resolves claims brought under the Ontario *Human Rights Code*,[7] a provincial law that protects people in Ontario from discrimination and harassment in five areas: employment, accommodation (housing), goods, services and facilities, contracts, and membership in trade and vocational associations. Mediations are an important part of the HRTO process and the tribunal hopes to settle approximately 70 percent of applications by mediation.[8]

ADR Procedure Rules that Apply

The HRTO has its own rules of procedure and specifically rules as they relate to dispute resolution. Under the Rules of Procedure for the HRTO, Rule 15.1 is the starting point for ADR, which provides mediation assistance to disputants through the tribunal procedures by offer or upon request by the disputants.[9] Like the HRTO application process, utilizing the mediation process is free.[10] The HRTO has attempted to increase access to justice by tackling one of the most common barriers: costs placed on applicants. Special requests can be made to the tribunal if an accommodation is required due to a specific disability, religion, or if a translator is needed.

How to Attain to Mediation

Based on the wording of Rule 15.1 and the Human Rights Legal Support Centre's (HRLSC) "An Applicant's Guide to Preparing for a Mediation at the Tribunal," participation in the mediation process is voluntary.[11] There are a few ways that the disputants can reach the mediation process. Disputants can request mediation from the outset of their application by selecting the box that indicates whether the disputant is interested in utilizing mediation (see Form 1 of the HRTO Application or the Form 2 Response).[12] Second, the HRTO may, on its own belief, attempt to request that the matter be resolved through mediation.[13] In fact, in order to resolve the dispute without going to trial, the HRTO asks every person or organization responding to a human rights application to participate in a mediation.

7 RSO 1990, c H.19.

8 Human Rights Legal Support Centre, "An Applicant's Guide to Preparing for a Mediation at the Tribunal" (last visited 1 July 2022), online: HRLSC <https://www.hrlsc.on.ca/en/how-guides/applicant%E2%80%99s-guide-preparing-mediation-tribunal>.

9 Human Rights Tribunal of Ontario, "Rules of Procedure" (24 October 2017) Rule 15.1, online: *Tribunals Ontario* <https://tribunalsontario.ca/documents/hrto/Practice%20Directions/HRTO%20Rules%20of%20Procedure.html>.

10 *Supra* note 8.

11 *Ibid.*

The Mediation Process

Once both parties have agreed to participate in mediation, the tribunal may issue a Notice of Mediation that will set out the date, location, and time of the mediation. Mediations are typically scheduled to occur within six months after an application has been filed.[14] Hearings, on the other hand, may be completed within one year of the application, or longer, depending on the complexity of the matter. The location of these mediations vary and can range from the local regional centre to another tribunal's office, hotel, government building, or other location.

Prior to the mediation, the parties would be required to sign a confidentiality agreement that can be found on the HRTO website. The agreement stipulates that matters disclosed are confidential, the agreement must be signed prior to mediation, and a person with authority to settle on a party's behalf must be present during the mediation. The mediation process is flexible in accommodating specific needs. For instance, if reasons are given, both disputants may be in separate rooms while the mediator shuttles between them. Conversely, the mediator may also utilize a more open style or rely upon private caucusing.[15]

If the mediator is unable to facilitate a resolution, the mediator will not be the adjudicator in the hearing (an exception to this will be described further below).[16] If a settlement is not reached, the tribunal will schedule a hearing within 3–6 months (although in more complex cases a second mediation may occur).[17] However, if a settlement agreement is reached, the disputants draft and sign the Minutes of Settlement and sign Form 25: Confirmation of Settlement.

HRTO Mediators

Interestingly, the HRTO mediators are also the same adjudicators who preside over cases at HRTO hearings.[18] The HRTO's resource "A Guide to Mediation at the Human Rights Tribunal of Ontario" provides potential disputants with helpful information about what the mediation process is and what to expect during their own mediation. These tribunal members are human rights experts. All the adjudicators are appointed to the HRTO by a competitive government process and receive additional training.[19] According to the HRTO guide, mediators utilize an evaluative style of mediation as they apply their knowledge of human rights law as an adjudicator to discuss the strengths and weaknesses of a case to promote settlement; however, the HRLSC guide states that mediators stop short of providing legal opinions.

Mediation-Adjudication process

In some cases, a tribunal member hearing an application may also act as a mediator. Pursuant to Rule 15.1A, with the disputants' consent, the hearing adjudicator may utilize the mediation-adjudication process in resolving the dispute.[20] The parties would first sign a mediation-adjudication agreement before commencing the mediation. In this process, the hearing adjudicator would first attempt to mediate the situation with the disputants to settle the matter. If this process fails, the hearing adjudicator would then switch roles and adjudicate the matter as a formal HRTO hearing.[21] This ADR style would allow the HRTO to resolve the matter faster by offering both mediation and adjudication at the same time. Although there are serious concerns with utilizing a mediation-arbitration style, such as bias (even if it is not intended), and the disputants may be more reluctant to participate in the process as the adjudicator could utilize the knowledge they have gained during mediation at the hearing. However, the ability to opt in to this style allows the disputants to choose the style they prefer—although there may be a small concern of self-represented disputants being unable to fully appreciate the risks.

The Landlord and Tenant Board

The Landlord and Tenant Board (LTB) is an Ontario administrative tribunal that resolves disputes between residential landlords and tenants in accordance with the *Residential Tenancies Act, 2006* (RTA).[22] While mediation is an important part of the LTB, an examination of the Tribunal Ontario's 2020-21 Annual Report reveals that only 14 percent of cases were resolved through mediation and 40 percent were resolved through hearings, while 30 percent were withdrawn.[23]

ADR Procedure Rules that Apply:

Pursuant to Rule 13.1 of the LTB's Rules of Procedure (and section 194(1) of the RTA), the LTB offers disputants optional mediation services that would typically occur on the day of the hearing.[24] However, mediation is only mandatory if the matter deals with in care home transfer applications.[25] Mediation services offered by the LTB are also free, although the applications themselves are not free to file.

How to Attain to Mediation

Compared to the HRTO, the LTB seemingly lacks in how little it actively promotes mediation to disputants in resolving their disputes. The dismal 14 percent success rate of mediation noted above seems to reflect that conclusion. For instance, at the HRTO, the disputants are informed about mediation well in advance of any hearing. Both the

HRTO's Form 1 and Form 2 provide space to indicate whether mediation is desired. By contrast, in reviewing the LTB's various applications, it does not appear that there is a way to indicate whether mediation is desired.

The Mediation Process

Mediation is an informal and voluntary, free service offered by the LTB, usually on the same day as the hearing. Parties can also request mediation in advance of the hearing date. Mediation is a private and confidential process. If the matter is not settled and proceeds to a hearing, information discussed within the mediation cannot be used or shared during the hearing. If an agreement is reached within the mediation, the Dispute Resolution Officer assists the disputants in finalizing the terms. The agreement is confidential between the parties and the Board does not keep a copy of the agreement. An interesting fact about the LTB mediation process is that if a party fails to follow through on the terms of the mediation agreement, there is recourse available to reopen the application and proceed to a hearing.[26]

If mediation fails to produce a settlement, then, depending on the timing, the hearing will likely occur on the same day as the mediation.[27] It is interesting to consider that the mediation and potential hearing would occur on the same day. A large point of this book is to determine the optimum time for mediation to occur during the litigation process. Mediation occurring early may not be wise, as an agreement is made without developing the necessary facts. If it is too late, the disputants may be focused more on a litigation mindset and may not find the value in attempting to utilize an ADR process. It would be curious to consider how effective the LTB is at fostering settlements considering the way they structure their mediation process.

LTB Mediators

At the LTB, the mediator is known as the Dispute Resolution Officer (DRO), and is not a board member. The DRO provides an evaluative role as the DRO can provide information about the law but will not provide legal advice.[28] Their main purpose is to help parties discuss their tenancy problems including matters that were not originally part of the tenancy application. The mediators will assist the parties in coming to an agreement, however, a party can end the mediation at any time and proceed to a hearing.

Online Dispute Resolution

ADR allows individuals to seek justice in a format and style to fit their needs. Rather than being passive recipients of a binding decision, disputants can proactively work together and create solutions that would otherwise be unattainable. The use of ADR is a step in the right direction. However, it is important to consider whether ADR processes can be expanded even further to provide greater accessibility and enhanced access to justice. Such an expansion includes the use of technology to allow dispute resolution services to be offered virtually through a process known as **online dispute resolution (ODR)**.

online dispute resolution (ODR)
the process of combining technology with ADR to resolve a dispute

Understanding ODR

ODR is the process of combining technology (the Internet) with ADR to resolve a dispute. It can be defined as "technologically assisted dispute resolution systems or services."[29] As Cole and Blankley state, "At its most basic level, online dispute resolution (ODR) is any method by which parties attempt to resolve disputes online."[30] It can include synchronous or asynchronous discussions, email negotiations, or mediation and arbitration processes making use of videoconferencing, chat functions, and virtual breakout rooms. However, ODR is more than simply moving traditional dispute resolution processes to an online platform. ODR seeks to improve how these processes function in order to provide a better experience for the users. It allows for new, innovative strategies and techniques (e.g., the use of artificial intelligence) that would not be possible with traditional ADR. In essence, the goal of ODR is to take advantage of the availability and increasing development of a wide array of technology to better improve the dispute resolution process.[31] As summarized by Benyekhlef and Vermeyes:

> ODR draws its main themes and concepts from alternative dispute resolution (ADR) processes such as negotiation, mediation, and arbitration. ODR uses the opportunities provided by the Internet not only to employ these processes in the online environment but also to enhance these processes when they are used to resolve conflicts in offline environments.... Like ADR ... at its core is the idea of providing dispute resolution in a more flexible and efficient manner than is typical with courts and litigation.[32]

Emergence of ODR

In 1981, Roger Fisher and William Ury published the book *Getting to Yes*,[33] that quickly became an international guide to ADR. In *Getting to Yes*, Fisher and Ury stress the importance of resolving disputes by means other than the court system. This brought ADR to the forefront for dealing with legal disputes. Parallel to this development in dispute resolution, a new technological revolution was unwinding in the United States. Also in 1981, the National Science Foundation (an independent agency of the US government) provided a grant to establish a computer science network (CSNET). This network of researchers and academic institutions essentially marked the birth of the Internet.[34] As such, the year 1981 marked the beginning of two independent

26 *Supra* note 24 at Rule 13.11.

29 Department of Justice, "Dispute Resolution Reference Guide" (last modified 19 January 2015) at para 2, online: *Department of Justice* <https://www.justice.gc.ca/eng/rp-pr/cj-jp/cdprs-sprd/res/drrg-mrrc/10.html>.

30 SR Cole & KM Blankley, "Online Mediation: Where We Have Been, Where We Are Now, and Where We Should Be" (2006) 28 U Tol L Rev 193.

31 *Supra* note 29 at para 1.

"The End of ODR," *Slaw* (1 October 2015) at para 3, online: Slaw <https://www.slaw

York: Penguin, 1981).

ation <https://www.nsf

revolutionary movements, which would later combine to become ORD. Over time, ODR has grown exponentially. Today, ODR is seen as an emerging innovative variation of ADR that co-exists parallel to traditional ADR processes. This new form of dispute resolution is now officially recognized by the United Nations Commission on International Trade Law (UNCITRAL), the UN's core legal body in the field of international trade law regulations.[35]

Use of ODR

Prior to 1995, the Internet was primarily used by academic and military institutions.[36] Since that time, it has rapidly expanded into many sectors, including the commercial sector. The Internet removes geographical boundaries and creates opportunities for global e-commerce. The commercialization of the Internet inevitably led to conflicts resulting from such transactions and prompted the need for a new way to deal with these conflicts. One ODR expert explained that "[t]echnology not only alters the way we communicate. It also alters how we experience conflict and the way in which we resolve these disputes."[37] An ODR framework works well to deal with both business and consumer disputes and can be adapted for use in many different environments, including companies, tribunals and the courts.

eBay

One of the first companies to introduce a widely used ODR service was eBay, which uses a fully online platform to resolve consumer disputes. eBay's ODR service resolves 60 million disagreements each year.[38] Like many other ODR platforms, eBay has the goal of providing resolution for low-value, high-volume disputes (e.g., non-payment by buyers, complaints from buyers that the item did not match the description).[39] The Civil Justice Council (CJC), an online dispute resolution advisory group, explains eBay's resolution options as follows:

- The disputants are first encouraged to negotiate between themselves. eBay provides the disputants with critical resources and information that assists them through this process.
- If disputants are unable to resolve their matter, eBay offers an arbitration service where disputants enter into an online resolution area, provide their evidence, and then an eBay staff member will adjudicate a binding decision.
- Arbitration may also be offered by an independent third-party company to resolve disputes relating to negative feedback received either by the buyer or seller.[40]

eBay combines some of the "traditional" ADR processes while allowing users to resolve their matters online, managing to keep these disputes out of the courtroom.

The reason why eBay's ODR platform is significant is because it recognizes the importance of creating a tool that allows disputants to resolve conflict on the same platform from which it originated. Since many of the disputes are over low-value items, it would not have been cost-effective for the consumers to seek legal advice or to commence a legal action. Without the use of ODR, there would be challenges (e.g., determining which jurisdiction's law would be applicable) in dealing with disputes that arise from international transactions. Fortunately, eBay's ODR platform allows a party to seek remedies from opposing parties worldwide. It is not an exaggeration to state that eBay inspired an ODR revolution in the civil justice system of many jurisdictions.[41]

British Columbia's Civil Resolution Tribunal

British Columbia's Civil Resolution Tribunal (CRT),[42] Canada's first online tribunal, uses ODR. It is also one of the first successful examples of the use of ODR in a civil justice system. Initially, the CRT limited the use of ODR to small claims and condominium disputes. However, in 2018, British Columbia introduced legislation to expand the CRT's ODR jurisdiction to include new areas, including motor vehicle accident disputes. The CRT offers an accessible and affordable way to resolve a dispute online without the need to hire a representative or attend court. The CRT process first provides online opportunities for negotiation and facilitation. If the matter is not resolved, it will then be forwarded to an adjudicator for resolution.

ODR and the Courts

The rise of ODR in jurisdictions around the world has had a significant impact on the delivery of justice in many countries, including Canada. ODR offers a significant technological and procedural shift from the court process. Many disputants have embraced ODR as a more convenient and cost-effective mechanism of conventional ADR. ODR can be viewed both as a complementary and competitive mechanism to the traditional courts.

When COVID forced restrictions on large gatherings and closed public spaces it also caused the justice system to scramble to utilize many of the technologies that ODR platforms had been using. This allowed the court system to continue to operate even amidst the global pandemic. For instance, the Supreme Court of Canada has adopted ODR technologies by allowing hearings to occur through the virtual and

35 UNCITRAL formally adopted its *Technical Notes on Online Dispute Resolution* at its meeting in New York, July 5, 2016. This represents the first formal international text recognizing and supporting the use of ODR as a new method of dispute resolution. For more information, see: UN General Assembly, "Technical Notes on Online Dispute Resolution" (2016-17), online: *United Nations Digital Library* <https://digitallibrary.un.org/record/853454>.

36 *Supra* note 30 at 198.

video conferencing platform, Zoom.[43] Thus, it was useful to supplement the existing litigation process with ODR technology as it allowed the disputants to proceed with their litigation rather than having to halt the entire proceeding until the end of the pandemic. The use of ODR in the courts has provided an essential service for the many individuals who rely on these various courts for relief. Having to wait extended periods of time to resolve their issues would have been prejudicial, especially to the vulnerable populations who rely on court services. Thus, adapting existing courts with modernized ODR technologies has been a vital step in ensuring access to justice. An interesting quote by Judge Myers describes the importance of enhancing current court capabilities with these ODR technologies:

> In my view, the simplest answer to this issue is, "It's 2020". We no longer record evidence using quill and ink. In fact, we apparently do not even teach children to use cursive writing in all schools anymore. We now have the technological ability to communicate remotely effectively. Using it is more efficient and far less costly than personal attendance. We should not be going back.[44]

Despite their use of technology, online courts (i.e., virtual courts) are not truly a form of ODR. ODR, as a subset of ADR, is an alternative to litigation. The courts are still considered the mainstream approach and integrating online practices does not make the court an alternative. Courts have been using Internet technologies for many years and will likely continue to assimilate ODR into their operations in order to create a new type of justice delivery.

APPROPRIATENESS OF ODR

The following questions could be important considerations in determining whether ODR is an appropriate manner to settle the existing dispute:

1. Are there really only a few issues at stake?
   - ODR is best-suited to deal with a small number of issues, and is often best when the issue at stake is an amount of money rather than issues pertaining to liability.
2. Are there only a few parties?
   - ODR works best when there are only a few parties.
3. Can the factual and/or legal issues be concisely presented?
   - Given that most of ODR involves electronic communication, often in writing, it works best where the issues can be clearly stated.
4. Are the factual issues dependent on the parties' differing opinions or on their credibility?
   - ODR is more effective where factual issues are not dependant on credibility.
5. Are witnesses required to give testimony in order to resolve the dispute?
   - Some ODR processes may not easily allow for witnesses to testify, particularly if the ODR process focuses on the negotiation or mediation phase of a dispute.
6. Are the parties being unrealistic regarding the outcome of the case?
   - Where the parties are unrealistic about outcomes, ODR may not be successful, particularly if the process is focused on the negotiation or mediation phase of the dispute.
7. Is the issue of law relatively settled or in flux?
   - If there are issues of law that are unsettled, the matter may not be appropriate for ODR.

Source: Department of Justice, "Dispute Resolution Reference Guide" (last modified 19 January 2015), online: *Department of Justice* <https:// www.justice.gc.ca/eng/rp-pr/csj-sjc/dprs-sprd/res/drrg-mrrc/10.html>.

Benefits of Using ODR

The term "online dispute resolution" does not refer to a single distinct process; rather, it is a collection of different processes that can be used in a variety of ways for unlimited types of situations and issues. The inherent benefits of using ODR can vary from situation to situation. A summary of some of the common fundamental benefits are discussed below.

Ability to Deal with Contentious Issues

ODR can be useful for dealing with contentious issues that would otherwise lead to highly emotional or heated discussions. The use of technology can act as a buffer. Participants may be better able to control their reaction to an online comment than to a face-to-face comment. As such, ODR allows the participants to better regulate their own behaviour during difficult discussions.

Convenience and Accessibility

Disputants can participate in the resolution process from the comfort of their own home or office. There is no need to travel, attend a specif c location or to rent a venue for the discussions. Not only does this make ODR convenient, but it also makes it an accessible process for participants who may be physically unable to meet in person or who have mobility issues.

Cost Savings

As a user-friendly process, ODR may mean that fewer disputants will retain legal representation for small-scale matters that they can resolve on their own. This can amount to a tremendous savings to the consumer.

Efficiency

The use of ODR allows disputes to be resolved efficiently within short time frames. Resolving minor matters outside of the courtroom will also lead to reduction in the current court backlog and wait times for larger matters that are scheduled for litigation.

43 L MacKinnon, "Like Everyone Else, the Supreme Court of Canada Will Be Working Remotely—on Zoom" *iPolitics* (14 May 2020) at para 2, online: <https://ipolitics.ca/2020/05/14/like-everyone-else-the-supreme-court-of-canada-will-be-working-remotely-on-zoom>.

44 *Arconti v Smith*, 2020 ONSC 2782 at para 19.

Flexibility

ODR is informal and flexible. Parties are able to participate in a process that has been designed to suit their specific needs. For example, if an asynchronous format of ODR is being used, participants will be able to provide their online submissions at any time of the day or night.

Global Capabilities

The Internet allows for the international purchase of products and delivery of services. As a result, business no longer has geographical boundaries. ODR can bring parties together from across the globe to resolve any disputes that may arise from these international transactions.

Concerns with the Use of ODR

As with any process, there are some concerns relating to the use of ODR for legal disputes. While it can be extremely beneficial, it should be only be utilized on a case-by-case basis.

- *Access to Technology*: The reliance on technology for ODR can be seen as prohibitive for some people. Not everyone has access to technology or the internet. This can create a digital divide where ODR services are only available to the people who can afford the required technology. As such, it can serve as a barrier to accessing justice for disputants in low-income communities.
- *Knowledge of Technology*: Using ODR also assumes some level of technological knowledge and ability amongst the users, but this may ultimately alienate some groups of people (e.g., elderly parties).
- *Less Interaction*: Participants in an ODR process experience a different dispute resolution environment than the participants who are face to face at the negotiating table. While ADR attempts to bring people together in a therapeutic manner to improve the relationship, ODR allows them to remain distant and with limited interpersonal interaction through the Internet.
- *Technology Issues*: The reliance upon technology to participate in ODR has some inherent risks—technology issues can arise (e.g., computer problems, audio difficulties, weak bandwidth). Further, a digital platform also requires steps to preserve security (e.g., encrypt software) to avoid data breaches.
- *Confidentiality*: It can be difficult to enforce rules relating to confidentiality provisions (e.g., prevent participants from recording, taking screenshots). This is particularly a concern for licensed legal representatives who have a requirement to abide by the confidentiality requirements of their provincial law society.
- *Difficult to Assess Credibility*: When parties do not meet face to face, it is difficult to read body language and facial expressions. As such, remote proceedings can present challenges when questioning witnesses or assessing their credibility.

Despite these concerns with the use of ORD, it is expected to continue to expand into more businesses, tribunals, and courts throughout the world. But care should be taken to ensure that it is accessible to all and that it can offer the same benefits as other ADR processes.

ADR Training and Certification

Having a Career in ADR

What if you want to be a mediator or arbitrator? Since neither one is a statutorily regulated profession, it is possible for anyone to become a mediator or arbitrator without certification. Despite the lack of required certification, there are several educational programs and designations that can be obtained. Many successful mediators and arbitrators develop expertise through certification and membership in various ADR organizations that also impose a code of ethical conduct. As a result, ADR professionals and the largely self-regulated industry have developed in a way that promote a high level of professionalism. Canada and individual provinces have professional associations that offer training, certification, rules, and codes of conduct.

Mediator Qualifications

Legal Representative as a Mediator

As a self-regulated profession, there is no legal requirement to qualify as a mediator. That means lawyers and paralegals can also practise as mediators. Some legal representatives can choose to turn mediation into their career, or others may act as a mediator on a part-time basis while continuing to represent clients as a legal practitioner. In either case, a provincial law society's rules of conduct for legal representatives may set out strict requirements as to how such an activity would take place. For a more detailed review of the requirements, please review the *Paralegal Rules of Conduct*[45] outlined in Chapter 1.

First, the practice of acting as a mediator while also practising as a legal representative constitutes an "**outside activity**," which is an activity that may overlap or be connected to the provision of legal services. As such, the legal practitioner must continue to fulfill their obligations under the rules of conduct. For example, Guideline 2 of the *Paralegal Professional Conduct Guidelines*[46] requires paralegals acting as mediators to act with integrity, be civil and courteous, be competent in providing legal services, avoid conflicts of interest, and maintain confidentiality. Of particular concern is that the paralegal acting as a mediator may be in a conflict of interest. The Guidelines instruct paralegals as follows:

> When acting as a mediator, the paralegal should guard against potential conflicts of interest. For example, neither the paralegal nor the paralegal's partners or associates should provide legal services to the parties. Further, a paralegal-mediator should suggest and encourage the parties to seek the advice of a qualified paralegal or a lawyer before and during the mediation process if they have not already done so.[47]

outside activity
an activity that may overlap or be connected with the provision of legal services

45 Law Society of Ontario, *Paralegal Rules of Conduct* (1 October 2014; amendments current to 24 February 2022), online: <https://lso.ca/about-lso/legislation-rules/paralegal-rules-of-conduct>. For the most up-to-date material, please visit the website referenced in this footnote

46 Law Society of Ontario, *Paralegal Professional Conduct Guidelines* (1 October 2014 amendments current to 24 February 2022), online: <https://lso.ca/about-lso/legislation-rules/paralegal-professional-conduct-guidelines>. For the most up-to-date material, please visit the website referenced in this footnote.

47 *Ibid* at Guideline 2.

> Once the legal practitioner proceeds as the mediator, the Law Society of Ontario sets out in their rules of conduct the responsibilities of acting as a mediator. For example, Rule 2.01(6) of the *Paralegal Rules of Conduct* states the following:
>
> > A paralegal who acts as a mediator shall, at the outset of the mediation, ensure that the parties to it understand fully that the paralegal is not acting as a representative for either party but, as mediator, is acting to assist the parties to resolve the issues in dispute.[48]
>
> It is essential that the parties are aware that the mediator is not acting in the role of a paralegal, but as a mediator, and will not be providing any legal advice. However, the Guidelines clearly do not preclude the mediator from explaining the consequence if the mediation fails.[49]

Professional Associations for ADR

Lawyers and paralegals are not the only ones who can become mediators and arbitrators. Other individuals can practise ADR without any credentials or legal training. Fortunately, the ADR profession has developed in such a way that most ADR practitioners have received training and qualifications in their positions, and adhere to codes of conduct. In fact, in order to appear on the mediation roster through the Civil Court's **Ontario Mandatory Mediation Program** (OMMP), mediators are required to have mediation training and experience which can be obtained through a variety of methods.[50] ADR associations offer education programs, have established accreditation, and even have a code of ethics to round out their own regulatory structure. Once a member, these organizations provide ADR professionals with continuing education, insurance to practice, networking, advertising, designations, practice standards, employment opportunities, and industry news and resources, among other benefits. We will examine the national professional association in Canada that is quickly setting a high standard with affiliates in provinces across Canada. Specifically, the ADR Institute of Canada (ADRIC) and its affiliates collaborate to ensure the availability of certified ADR professionals across Canada.

Ontario Mandatory Mediation Program
court-imposed mediation program specific to certain civil lawsuits in the jurisdictions of Toronto, Ottawa, and Windsor

ADR Institute of Canada

ADRIC is a national, professional organization that provides education, training, accreditation, and a regulatory framework that includes a code of ethics and a code of conduct for mediators. It has over 2,400 ADR practitioners as members. According to its website,

> ADRIC sets the standard for best practices for ADR (alternative dispute resolution) in Canada and provides leadership, value and support to our individual and corporate members and to our clients. We provide education and certification, promote ethical standards and professional competency, and advocate for all forms of ADR for public and private disputes.[51]

48 *Supra* note 45.

49 *Supra* note 46 at Guideline 2.

50 Ministry of the Attorney General, "Apply to be on a Mandatory Mediation Roster" (last visited 26 August 2022), online: *Government of Ontario* <https://www.ontario.ca/page/apply-be-mandatory-mediation-roster>

51 ADR Institute of Canada, "About Us" (last visited 1 July 2022), online: *ADRIC* <https://adric.ca/about-us>.

their mission is as follows:

- Stay on the leading edge of ADR and best practices in Canada and the world
- Support the development of the ADR profession and professionals through information sharing, professional development initiatives, business supports and networking
- Provide standards and professional designations to ensure ethics and competence in the provision of ADR services.
- Act as or remain a hub of information and resources to help people and organizations become aware of and learn about ADR and how it can help their families, business and organizations.
- Assist people and organizations to access the ADR professionals they need.
- Collaborate with other organizations to influence the field of ADR and its effective use in both Canada and Internationally.[52]

Mediator and Arbitrator Certification in Canada

ADRIC offers specific professional designations for mediators and arbitrators who meet certain educational requirements and have a designated number of hours of experience. The designations must be maintained by remaining a member of the ADRIC, as well as carrying proper insurance and meeting industry standards. To become a nationally qualified or chartered mediator or arbitrator you must obtain the designations below.

ADRIC offers two levels of designation for mediators and arbitrators in Canada: Qualified, which is an entry-level designation, or Chartered, which is a senior-level designation. Members with a Qualified designation allows the member with minimum training and practice experience to practise at an entry level while continuing to learn and gain experience. Members with a Chartered designation are considered highly experienced members, and the designation is known and respected across Canada and internationally. In fact, many federal government departments require their practitioners to have a Chartered designation, including Health Canada, the Department of Justice Canada, the Canada Revenue Agency, and Public Safety Canada. ADRIC has additional specialized designations for family practice and construction adjudication designations.

ENTRY-LEVEL QUALIFIED DESIGNATIONS

Qualified Mediator (Q.Med designation)

- 40 hours of basic mediation and hearing procedure training (e.g., certificate, degree, diploma).
- 40 hours of specialized mediation and related training (e.g., certificate, degree, diploma).
- Conducted two supervised and assessed practice mediations and/or two actual mediations or co-mediations where the applicant has been the lead mediator, paid or unpaid.
- Continuing practice commitment (conduct one additional mediation within three years of the designation being awarded).

52 *Ibid.*

- Complete ADR continuing education.
- Comply with ADRIC's Code of Ethics.[53]
- Proof of Errors and Omission Insurance with a $1 million limit.
- Full member in good standing with ADRIC or affiliate.

Qualified Arbitrator (Q.Arb designation)

- 40 hours of basic mediation training (e.g., courses, degrees, certificate).
- Written examination approved by ADRIC.
- Continuing education.
- Comply with ADRIC's Code of Ethics.
- Proof of Errors and Omission Insurance with a $1 million limit.
- Full member in good standing with ADRIC or affiliate.

SENIOR-LEVEL CHARTERED DESIGNATIONS

Chartered Mediator (C.Med designation)

- 80 hours of mediation theory and skills training (e.g., certificate, degree, diploma).
- 100 hours of related study; training or education related to mediation or dispute resolution (e.g., certificate, degree, diploma).
- 15 completed paid mediations as sole or lead mediator.
- Continuing education.
- Comply with ADRIC's Code of Ethics.
- Proof of Errors and Omission Insurance with a $1 million limit.
- Full member in good standing with ADRIC or affiliate.

Chartered Arbitrator (C.Arb designation)

- 40 hours of an approved ADRIC accredited course of study (e.g., certificate, degree, diploma).
- Written examination within the last ten years.
- Ten years of fee-paid arbitration experience.
- Copies of 2 arbitration awards.
- Continuing education.
- Comply with ADRIC's Code of Ethics.
- Proof of Errors and Omission Insurance with a $1 million limit.
- Full member in good standing with ADRIC or affiliate.

CHARTERED MEDIATION-ARBITRATOR (C.MED-ARB)

The Chartered Mediator-Arbitrator designation is a distinct and innovative ADR qualification that is not well known to consumers of ADR services. It is designed to meet the particular needs of disputants by the merging of separate mediation and arbitration processes. According to ADRIC,

> In this process, parties first attempt to reach an agreement with the help of a mediator. If the issues remain unresolved or the mediation comes to an impasse, the parties may move on to arbitration. If qualified as an arbitrator, the mediator can assume the new role and make a binding decision quickly as all the facts are already known, or the mediator can hand over the case to an arbitrator.[54]

The criteria to be recognized by the ADRIC as a Chartered Mediation-Arbitrator includes the following:

- C.Med designation
- C.Arb designation
- 16 hours of ADRIC Med-Arb training course
- Continuing Education
- Comply with ADRIC's Code of Ethics
- Proof of Errors and Omission Insurance with a $1 million limit
- Full member in good standing with ADRIC or affiliate

Path to designation as a Mediator in Canada

Path to designation as an Arbitrator in Canada

The educational training listed above for Qualified and Chartered designations notes the requirement of a certificate, degree, or diploma. These can be obtained from numerous educational institutions including colleges, universities, or other organizations with accredited programs. ADRIC recommends specific ADRIC accredited courses and encourages individuals to contact those institutions directly to have the course preapproved. ADRIC will regularly list ADRIC accredited courses with dates and locations on its website. In addition, particular affiliated organizations such as the ADR Institute of Ontario (ADRIO) list ADR training courses that have been evaluated by the ADRIO and count as full ADRIO and ADRIC designations.[55]

54 "FAQ: What is Med-Arb?" (last visited 1 July 2022), online: *ADR Institute of Canada* <https://adric.ca/

CHAPTER SUMMARY

The purpose of this chapter is to explore selected topics in ADR, namely IDR, administrative tribunals, ODR, and ADR training opportunities. Historically, Indigenous peoples have a preference for their own dispute resolution processes instead of the court system. Integrating IDR into traditional court and ADR processes can provide an opportunity to increase access to justice in both Indigenous and non-Indigenous communities while offering a more culturally sensitive and inclusive approach to justice. Administrative tribunals affect the day-to-day lives of many people outside of the regular court system. As a result, ADR continues to grow in importance as part of the distinct and unique legal processes of various tribunals. ODR is a unique form of dispute resolution that offers a platform to resolve a range of disputes. To date, ODR has not reached its full potential. In commenting on the importance of ODR for the future of arbitration, the president of the ICC International Court of Arbitration, Alexis Mourre, stated, "There may be no more relevant topic than this one for the future of dispute resolution."[56] For those interested in ADR opportunities as a mediator or arbitrator, there is an increasingly high standard of professionalism to meet despite the fact that ADR is an unregulated profession. As the growth of ADR expands in a variety of judicial, community, business, and government environments, the future of ADR as a career will continue to grow as a fulfilling, and accomplished profession.

KEY TERMS

adjudicator, **295**
administrative law, **295**
agency, **295**
circle processes, **292**
Indigenous dispute resolution (IDR), **292**
online dispute resolution (ODR), **301**
Ontario Mandatory Mediation Program, **308**
outside activity, **307**
quasi-judicial function, **295**

REVIEW QUESTIONS

1. If an Indigenous community member was a victim of robbery, which type of circle would be best used to bring everyone together who was impacted by the offence?
   a. Healing circle
   b. Sentencing circle
   c. Reintegration circle
   d. Community-building circle
2. Whose needs are considered the most important in IRD processes?
   a. Individual needs.
   b. Systemic needs.
   c. Government needs.
   d. Community needs.
3. List five sources that should be considered when reviewing the procedures of a tribunal involving ADR.
4. What is the mediation-adjudication process?
5. Which of the following is NOT considered to be a concern of using ODR?
   a. Internet acts as a buffer for behaviours.
   b. Requires access to technology.
   c. Difficult to enforce confidentiality.
   d. Difficult to assess credibility.
6. What is the minimum educational requirement to become a mediator?
   a. 40-hour certification course.
   b. Degree in Mediator Studies.
   c. Designation as a C.Med.
   d. No formal certification required.
7. What is an "outside activity" as it relates to the *Paralegal Rules of Conduct* and how does it apply to a paralegal who is acting as a mediator?

EXERCISE

1. Negotiation Role Play: Fertility (see Appendix A)

56 "Three Takeaways on How Digital Technologies Are Transforming Arbitration" (30 August 2017), online: *International Chamber of Commerce* <https://iccwbo.org/media-wall/news-speeches/three-takeaways-digital-technologies-transforming-arbitration>.

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Appendix A Role Play: Fertility Negotiation

Type: Negotiation

Participants: Two paralegals

Level of Difficulty: Medium

Time: Set aside approximately 40 minutes for this activity, including 10 minutes to read to background information and roles, 20 minutes for the negotiation, and 10 minutes for the debrief.

Objectives

- Allow students to practise their negotiation skills.
- Appreciate how to address ethical issues.

Procedure

- Divide students into groups of two.
- Assign a role to each student.
- Ask students to read their roles.

Debriefing with Students

- Review Fertility Dispute teaching slides.
  1. How did you feel during this negotiation?
  2. What information did you choose to reveal? Why?
  3. What information did you choose to refrain from sharing? Why?
  4. How did you feel after learning about your partner's role?
  5. Discuss which of the paralegal duties within the *Paralegal Rules of Conduct* may be affecting in this negotiation and how they may affect the outcome.

Fertility Issue

Background Information for All Parties

Jay Smith is a journalist who recently graduated from the University of Ottawa. He married his high school sweetheart, Shelly, two years ago, and just secured his dream job with the *Toronto Star* last year. Now that Jay and Shelly both have stable jobs and incomes, they have bought a house (with a big mortgage) and began trying to start a family.

Austin Rutherford is a good friend of Jay's. He is in his second year of medical school at the University of Toronto and has been working two jobs to pay his tuition. Before applying to medical school, Austin worked for several years in the financial sector. He often dabbled in the stock markets and made about $50,000 over the last several years. Austin kept this money in a savings account and later used it to help pay for medical school. He has no other significant assets or liabilities.

On June 3, Jay and Austin left town for a guy's weekend. They are both quite adventurous, and love to ride their dirt bikes on the trails up in northern Ontario. As they rode the empty trails in the woods, they came to an open pit area popular with dirt bikers. They had both been to the pit before and were aware of the unwritten rule to ride the trails in a clockwise direction to avoid any potential collisions. Austin, not realizing Jay was on the track, decided to ride in the opposite direction to catch a jump he had missed. At that same moment, Jay came around the corner in the regular clockwise direction. The two riders collided. Neither Jay nor Austin had their dirt bikes insured.

Both Jay and Austin sustained injuries in the collision. Austin escaped with only a broken arm, but Jay sustained more serious injuries. He was hospitalized for over a month with several broken ribs and a broken pelvis. Furthermore, the doctors told him that the nature of his injuries had likely rendered him sterile and he would likely not be able to conceive children. Jay and Shelly were devastated by this news. Their plan had been to have at least three children, which is why they bought such a large house.

Jay will eventually return to work, but he is more concerned with the way his ability to have children has been affected by the accident. He spoke to a paralegal about his rights, and the paralegal told him to obtain a complete health assessment to confirm the impact of the accident on his fertility. Jay followed this advice. While the results from the doctor are not conclusive, they did confirm his sterility. The likelihood of Jay and Shelly ever conceiving a child without the help of significant and expensive fertility treatments is very slim. It is estimated that one round of fertility treatments is $15,000.

As a result of the accident, Jay and Austin's friendship has deteriorated. Jay still considers Austin a friend, and recognizes that the collision was an accident. He knows that the pit has no official rules, and that they were both riding without insurance. However, he also has a significant mortgage to pay and does not know if he will be able to afford both the mortgage and the fertility treatments. Jay does know that Austin made quite

a bit of money through the stock market and he would like Austin to help pay for the fertility treatments.

Austin is truly sorry for what he did to Jay. He would like to help his friend, but also wants to be sure that he can finish medical school.

Role for Austin's Paralegal

Austin Rutherford is a previous client of yours for a landlord and tenant matter. This time, he has retained you to negotiate a settlement on a very complex and personal matter with Jay Smith. Austin blames himself for the dirt bike accident. He is deeply sorry for the injuries Jay sustained as a result of the accident and wants to help Jay as much as possible. It has been over six months since the accident, and at this point, legal proceedings have not been initiated by Jay on this matter.

Although he would love to help Jay, Austin is in the middle of medical school and is concerned that he will not have enough money to complete his studies. He has instructed you to make a settlement that ensures he has enough money to finish medical school. Austin's father died when he was young and his mother is on disability benefits due to an injury that she sustained at work many years ago. She struggles to make ends meet, and was not able to put any money toward Austin's schooling.

Acting on behalf of Austin, as his paralegal, you agree to meet with Jay's paralegal to discuss the possibility of a settlement. The night before the meeting, as you were preparing settlement options, you received a telephone call from your client, Austin. He told you that he has just received news that his paternal grandfather has died and left him an inheritance of $500,000. With this money, Austin will be able to pay for medical school and help support his mother.

While Austin does intend to help Jay pay for some of the fertility treatments, he advised you that under no circumstances are you to tell Jay's paralegal about the inheritance. Austin has instructed you to make the best deal possible at the settlement meeting.

Role for Jay's Paralegal

Jay Smith was a previous client of yours for a highway traffic matter. This time, Jay has retained you to try to negotiate a settlement on a personal matter with Austin Rutherford. It has been over six months since the accident and, at this point, legal proceedings have not been commenced by Jay on this matter. You feel that despite the fact that there were no specific traffic regulations on the property, Austin should have adhered to the common practice used to avoid collisions. The problem is that Jay cares deeply about his friend and does not want to jeopardize Austin's future by forcing him to quit medical school.

Jay knows how hard Austin has worked to save money for medical school. Austin's father died when he was young and his mother is on disability benefits due to an injury that she sustained at work many years ago. They have always struggled to make ends meet, and she was not able to put any money toward Austin's schooling. Jay knows that, other than the money he saved from his previous jobs in the financial sector, Austin does not have much money to put toward fertility treatments. Jay has instructed that you try to negotiate a settlement that would provide a small compensation for the fertility treatments while leaving enough money for Austin to complete medical school.

As Jay's paralegal, you have prepared extensively for the meeting in the morning with Austin's paralegal. About an hour prior to the meeting, you received an urgent call from the lab that completed the fertility assessments on both Jay and his wife, Shelly. They had been required to complete assessments before beginning the fertility treatments, but the lab said these treatments may not be necessary after all—Shelly is three months pregnant. You called Jay to tell him the good news. Jay and Shelly were ecstatic and relieved, but you reminded him that you still have the meeting with Austin's paralegal. Jay instructed you to continue with the settlement discussions, but says that under no circumstances are you to tell Austin's paralegal that Shelly is pregnant. Jay feels that the worry, stress, and potential for future fertility problems is worth some compensation. In addition, Jay thinks that Austin was ultimately responsible for the accident. You have been instructed to make the best settlement on behalf of Jay.

ADR Worksheet for Negotiation
The Fertility Dispute*

Your Client's Position ~ What am I seeking?

1. _____

Your Client's Interests ~ Why am I seeking what I am seeking? What I really care about (i.e., my wants, needs, concerns, hopes and fears).

1. _____
2. _____
3. _____
4. _____

Opposing Parties' Positions ~ Based on the information provided, what do I think they are seeking? What are their positions?

1. _____

Opposing Parties' Interests ~ Why are they seeking what they are seeking? What I think they really care about (i.e., their wants, concerns, hopes and fears).

1. _____
2. _____
3. _____
4. _____

Options ~ Possible agreements that we might reach.

1. _____
2. _____
3. _____
4. _____
5. _____

Objective Criteria/Legitimacy/ Proof ~ External standards or precedents that will help the parties to assess any options (e.g., market value, precedents, scientific judgment, professional standards, costs, what a court might decide, moral standards, expert opinions, equal treatment, or tradition). *Be specific to the scenario.*

1. _____
2. _____

BATNA (Walk Away Alternative) ~ What can I do if I walk away without agreement? What is my back up plan? What is my next step?

1. _____
2. _____
3. _____

*Adapted from R. Fisher & D. Ertel, *Getting Ready to Negotiate: The Getting to Yes Workbook* (New York: Penguin, 1995)

Glossary

access to justice the ability to use the legal system to obtain justice

accommodating a conflict management style that tends to make sacrifices for the other party to the dispute

active listening taking an interest in what people have to say and being an attentive recipient of the information

ad hoc arbitration a form of arbitration that is arrived at by consent of the parties as a means to circumvent litigation and that is completely independent of any statute or governing party (also referred to as *consensual arbitration*)

adjudicator a person who presides, judges, or arbitrates during a formal dispute

administrative law a type of law that developed from disputes about how our laws affect individuals, including citizens and businesses

ADR brief a written document that is provided to the mediator in order to outline the factual and legal issues in dispute; also known as a "statement of issues," "mediation brief," or "mediation memorandum"

advocate an individual who represents others by speaking, pleading, or arguing in their favour and on their behalf to ensure their rights are being upheld

agency any person, institution, body, board, or tribunal assigned governance powers under legislation

agreed statement of facts a document jointly presented to the arbitrator by both parties outlining the evidence that is not in dispute, thereby accelerating the process by forgoing the need for witness testimony

agreement to mediate a contract prepared by the mediator that sets out the general expectations for the mediation session; also known as "terms of mediation"

alternative dispute resolution (ADR) the use of methods such as negotiation, mediation, and arbitration as alternatives to litigation to resolve disputes

arbitral jurisprudence published written decisions from arbitrators outlining the reasoning for the outcome of other cases, which serve as a means of instructing decisions for future cases

Arbitration Act legislation that informs the parties about the nature of consensual adjudications, including how they are composed, the scope of the arbitrator's decision-making powers, how decisions are enforced, and the threshold upon which to appeal these decisions

arbitration a process that occurs before an arbitrator, someone who is not a judge but is a non-partisan third party selected by the disputants, who, after hearing the submissions of both parties, makes a final and binding decision in the dispute

arbitration award a decision or determination on the merits made by an arbitrator at an arbitration tribunal (also referred to as *arbitral award*)

argument in chief a summary argument made by the party who initiated the complaint

argument in rebuttal a short period following cross-examination that allows the party to pose specific questions to a witness about information that arose during the cross-examination that requires clarification

argument in reply final commentary made by the person who initiated the complaint

attribution theory a psychological theory based on the concept that people try to make sense of the world around them by attributing meaning to the behaviours of others

avoiding a conflict management style in which a party resists dealing with the issues in the dispute

BATNA best alternative to a negotiated agreement

bottom line establishing a final barrier in a negotiation that the client will not negotiate below. The least amount (minimum) that the client would be prepared to accept. It is meant to protect the client against accepting a bad agreement

circle of conflict a way to diagnose a conflict by examining six primary causes of conflict: data, values, experience/relationship, externals/moods, structure, and interests

circle processes a form of IDR that brings community members together to discuss and resolve conflict

code of ethical conduct set of written rules that regulate the ethical conduct of an individual, party, or organization such as a professional body

collaborating a conflict management style characterized by working with the other party to problem-solve and develop creative solutions

competent paralegal a licensed paralegal who has and applies the relevant knowledge, skills, and attributes appropriate to each matter undertaken on behalf of a client

competing a conflict management style in which one party strives to win at all costs

compromising a conflict management style that involves reducing expectations and getting only a portion of what was originally sought

compulsory arbitration a form of arbitration that is mandated by legislation

conflict a state of disharmony resulting from opposing views or incompatible positions and interests

consensual arbitration a form of arbitration that is arrived at by consent of the parties as a means to circumvent litigation (also referred to as *ad hoc arbitration*)

cross-examination the process of asking questions of witnesses, under oath, brought forward by the opposing side, to refute or challenge evidence that is unhelpful to your case

direct examination the process of asking questions of witnesses, under oath, whom you brought forward to elicit evidence that is helpful to your case

dispositional factor individual characteristics that influence a person's behaviour and actions

distributive justice fair allocation of resources among all members of a community

dominant style the way a person naturally and instinctually deals with conflict

domino effect making a change in one behaviour causes a chain reaction in other behaviours

evaluative mediation a form of mediation in which the mediator evaluates the strengths and weaknesses of each party's case

expanding the pie attempt by the negotiator to consider options and resources outside of the party's position

external attribution when an inference about behaviour is based on a situational factor that is outside of the party's control

facilitative mediation a form of mediation in which the mediator remains neutral by assisting and guiding the parties to come to their own resolution

fiduciary a representative who acts on behalf of another, has a duty of loyalty, and is legally obligated to make decisions in the best interests of the client

fiduciary duty a duty that requires legal professionals to put their client's interests ahead of their own

fixed pie the assumption by a negotiator that the resources and options are fixed

fundamental attribution error the tendency to attribute another party's behaviour to internal characteristics but our own behaviour to external factors

ground rules rules introduced by the mediator at the outset of mediation to encourage the parties to discuss their conflict in an appropriate manner

High-Low or Bracketed Arbitration a term of the arbitration wherein the parties agree in advance to the limits within which the arbitral tribunal must render its award

human needs theory a theory that suggests conflict is caused by a party's inability to meet his or her fundamental needs

Indigenous dispute resolution (IDR) processes that have been used by Indigenous communities to deal with conflict

interested third party an individual, group, or legal entity (corporation)—such as a customer, supplier, or neighbour—that, though having no direct involvement in the dispute before the arbitrator, is somehow influenced by the outcome of the decision

interests the underlying needs, concerns, desires, and fears of a party

internal attribution when behaviour can be explained by a personal characteristic or dispositional factor

joint session a mediation session in which all of the participants are together in the same room in order to work through the issues

judicial mediation a process in which a judge acts a mediator in facilitating settlement between the parties

Last Best Offer Arbitration a term of the arbitration wherein the arbitrator must decide which of the two parties has a more reasonable position and render its award based on that (also known as Pendulum Arbitration)

latent content the non-verbal cues that assist with interpretation, including tone, facial expression, and body language

Law Society of Ontario (LSO) the regulatory agency for paralegals in Ontario

legal opinion a written or oral opinion given by a licensed paralegal or lawyer to the client that expresses their judgment or advice based on the law that applies to a particular case

manifest content the actual words being spoken

mediation a process that occurs before a non-partisan third party who assists the parties in reaching a settlement by facilitating their negotiations with their joint consent

minimal encouragers short phrases or utterances that demonstrate to a speaker that they are being understood and should continue to speak

negotiation an alternative method of dispute resolution during which two or more persons communicate in order to reach an agreement on an action or actions to be taken

Non-Binding Arbitration a term of the arbitration wherein the arbitration award is not binding and the parties retain the right to go to court; often used as an independent assessment of the case

non-verbal communication the expressions and visual cues that supplement the verbal aspect of communication

objective criteria fair standards and fair procedures external to the negotiation that can help the parties assess the reasonableness of the options they generate

online dispute resolution (ODR) the process of combining technology with ADR to resolve a dispute

Ontario Mandatory Mediation Program court-imposed mediation program specific to certain civil lawsuits in the jurisdictions of Toronto, Ottawa, and Windsor

opening statement a statement delivered at the beginning of a mediation session to set out the position and interests for each party

outside activity an activity that may overlap or be connected with the provision of legal services

paraphrasing the rephrasing, in a listener's own words, of what a speaker has said

perspectivism the view that there is no one correct theory or viewpoint; instead, there are many different perspectives from which to view a conflict

positional negotiation a type of negotiation in which both sides take on successive positions only to give up a sequence of positions to achieve agreement that may or may not ultimately be reached

pre-hearing brief a document outlining your version of the theory of the case; analogous to a court's statement of claim

pre-hearing conference a meeting held between both legal representatives before the arbitrator in advance of the hearing for the purpose of establishing administrative and procedural issues

principled negotiation a method of negotiating on the merits designed to produce "wise outcomes, efficiently and amicably"

private caucus a private meeting with the mediator and one party without the other side present

procedural law the practice and procedural rules that a court or tribunal uses to prescribe the steps to enforce legal rights

professional conduct the accepted conduct or actions of professionals during the course of activities in their profession

professional judgment the capacity to assess situations or circumstances carefully and to make sensible decisions about matters and conduct

punctuating the conflict interpretation of the conflict is shaped by the lens chosen to view it

quantum of damages the amount of monetary compensation that may be awarded to a successful party in a claim

quasi-judicial function proceedings and functions that appear judicial but are conducted by a person that is not a judge or acting in a judicial capacity but resemble those of a court or judge

reality testing a tactic used by the mediator in order to encourage arriving at a settlement during mediation rather than going to court

rebuttal the opportunity to clarify information that arose during cross-examination (also known as re-examination)

reframing the act of removing negative language and replacing it with positive or neutral language

release release a term within a settlement agreement wherein the parties agree to give up any claims related to the initial legal matter in dispute against the other, including claims that are not yet known; also known as a mutual release or waiver

restorative process a process that strengthens the relationships between the parties by addressing the needs of participants and attempting to repair any harm

rights-based model a model of justice in which the rights of the individual are protected against the oppressive assertion of another's rights

Rules of Professional Conduct* and *Paralegal Rules of Conduct codes of conduct set out by the LSO that lawyers and paralegals are required to adhere to or risk losing their licence to practise law

***Scott v Avery* clause** a clause in an agreement that is included in a contract that is intended to avoid litigation by proceeding to arbitration (named after a decision in an 1856 British case)

self-monitoring closely monitoring another party's reaction to your statements and adjusting your words in order to achieve a favourable response and approval

self-regulated body an organization that has the power to create and enforce industry standards and regulations with its members

self-serving bias when internal attributions are assigned to situations where we are successful, but external factors to situations where we are unsuccessful

settlement agreement a settlement agreement is a legally binding contract that the parties use to settle the dispute and avoid going to court

settlement privilege communication made with the purpose of negotiating a resolution of a legal dispute and that may not be disclosed at trial

sharp practice when a paralegal obtains, or tries to obtain, an advantage for the paralegal or client(s), by using dishonourable means

stakeholder a party that is somehow affected by an arbitration; may include the disputants, their legal representatives, the arbitrator, witnesses, shareholders of an organization, customers, suppliers, competitors, and the public at large

statement of issues documentation required to be submitted to the mediator prior to the mediation session that sets out the issues that need to be discussed at mediation; also known as an "ADR brief," "mediation brief," or "mediation memorandum"

substantive law the statutory law and jurisprudence that creates, defines, and interprets the rights and obligations of those who are subject to it

summon the power of an arbitrator to compel an individual to attend a hearing as a witness, the same power and consequences of a court; also known in some jurisdictions as a *subpoena*

suspension the act of putting the temptation to fix, correct, and problem-solve on hold in an effort to more closely examine the issue

system any social unit, including a family, a company, or any other kind of social organization

systems theory a theory that suggests conflict cannot be viewed in isolation, but that it should be examined in relation to the entire system in which it takes place

target point a client's most desirable outcome of a negotiation

Thomas-Kilmann Conflict Mode Instrument (TKI) a questionnaire developed to measure conflict management styles

transformative process a process that strives to empower each of the parties and improve their relationship

value claimers parties to a negotiation who view the available benefits as a fixed pie and seek to claim the most benefits for themselves

value creators parties to a negotiation who seek to increase the available benefits

verbal communication conveying messages to others through the spoken word

WATNA worst alternative to a negotiated agreement

win–win negotiation a negotiated agreement that is beneficial to all parties in the negotiation

written communication conveying messages to others through the written word, including mail, fax, email, and text